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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

~~No. 665~~ 4

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN, APPELLANT,

vs.

THE GLIDDEN COMPANY, MARSHALL WELLS COMPANY, BANK OF COMMERCE AND SAVINGS, INC., OF DULUTH, MINNESOTA, ETC., ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

FILED JANUARY 17, 1931

(35,587)

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State of Minnesota.
In Supreme Court.

1930.

STATE OF MINNESOTA, County of St. Louis. } DISTRICT COURT, Eleventh Judicial District.

THE GLIDDEN COMPANY, a Corporation; MARSHALL WELLS COMPANY, a Corporation; BANK OF COMMERCE AND SAVINGS, INC., OF DULUTH, MINNESOTA, a Minnesota State Banking Corporation, and JOSEPH SUPORNICK, Plaintiffs,

vs.

THE RETAIL HARDWARE MUTUAL FIRE INSURANCE COMPANY OF MINNESOTA, MINNESOTA IMPLEMENT MUTUAL FIRE INSURANCE COMPANY OF MINNESOTA, and THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN, All Corporations, Defendants.

SUMMONS.

The State of Minnesota to the above named defendants:

You and each of you are hereby summoned and required to answer the complaint of the plaintiffs in the above entitled action, a copy of which complaint is hereto attached and herewith served upon you, and to serve a copy of your answer to the said complaint upon the subscribers, at their office, Room 1815, Pioneer building, city of St. Paul, Min-

[illegible] to be at a term [illegible]

[illegible] within twenty (20) days after the service of this summons upon you, exclusive of the day of such service, and if you fail to appear and answer said complaint within the time aforesaid, said plaintiffs will apply to the court for the relief demanded in the complaint.

KERR, NELSON, BURNS & MORAN,
1016 Pioneer Building,
St. Paul, Minnesota,
FEYBERGER, FULTON & DOYLE,
712 Lonsdale Building,
Duluth, Minnesota,
Attorneys for Plaintiffs.

(Title of Cause.)

COMPLAINT.

The plaintiffs herein, complaining of the above named defendants, allege:

I.

That at all of the times herein mentioned said plaintiff, The Gilfillan Company, was and still is a corporation, duly organized, created and existing, and authorized to and actually conducting business in the state of Minnesota.

II.

That at all of the times herein mentioned said plaintiff, Minnesota Wells Company, was and still is a corporation, duly organized, created and existing, and authorized to and actually conducting business in the state of Minnesota.

III.

That at all of the times herein mentioned said plaintiff, [illegible] and Savings Inst. of Duluth, Minn. was and still is a state banking corporation, duly organized, existing and carrying on business under and by virtue of the

[illegible] of the State of Minnesota, [illegible]
with its principal place of business at [illegible]
[illegible] Minnesota.

IV.

That at all of the times herein mentioned, said plaintiff, Joseph Superstein, was and still is a resident of the City of St. Paul, Minnesota.

V.

That at all of the times herein mentioned said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, was and still is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Minnesota, with its principal place of business at Minneapolis, Minnesota, and was and is engaged in the business of insuring property against loss or damage by fire, and was and is duly authorized to and actually transacting said business within the state of Minnesota.

That at all of the times herein mentioned said Minnesota Implement Mutual Fire Insurance Company of Minnesota was and still is a corporation, duly organized, created and existing under and by virtue of the laws of the state of Minnesota, with its principal place of business at Owatonna, Minnesota, and was and is engaged in the business of insuring property against loss or damage by fire, and was and is duly authorized to and actually transacting said business within the state of Minnesota.

That at all of the times herein mentioned said The Hardware Dealers Mutual Fire Insurance Company of Wisconsin was and still is a corporation, duly organized, created and existing under and by virtue of the laws of the state of Wisconsin, with its principal place of business at Stevens Point, Wisconsin, and was and is engaged in the business of insuring property against loss or damage by fire, and was

10 and is duly authorized to and actually transacting said business within the state of Minnesota.

VI.

That the Siegel Hardware Company is and was at all of the times herein mentioned a corporation, duly organized, created and existing under and by virtue of the laws of the state of Minnesota, with its principal place of business and headquarters at Duluth, Minnesota, and was engaged in a general mercantile business at Duluth, Minnesota, and is hereinafter for brevity referred to as "The Insured."

VII.

11 That on or about May 2nd, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from May 2nd, 1928, at noon, to May 2nd, 1929, at noon, in the amount of $2,000.00, upon all property (except notes, bills of exchange, accounts, evidences of and securities of property of every kind, money, currency and bullion) usual and

12 necessary to The Insured's business; its own or held in trust or on commission, or on consignment or sold but not removed, or the property of others for which it may be legally liable in event of loss; wardrobe of employers and employees; The Insured's interest in improvements and betterments to the building itself; printed books, and cards of record and account (at not exceeding cost as blanks and cost of transcribing same), all while contained in the two-story, gravel and brick building, situated at Nos. 102-104 East Superior street and 104½ E. Superior street, and 101-103-105 East Michigan street, and 4-6 South First avenue East, Duluth,

platforms, streets, alleys, and [illegible] in or on premises situate [illegible] 100 feet thereof, which said policy was designated as No. A60794, and was in the standard form prescribed by the laws of the state of Minnesota.

VIII.

That on or about May 31st, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from May 31st, 1928, at noon, to May 31st, 1929, at noon, in the amount of $7,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. A61410, and was in the standard form prescribed by the laws of the state of Minnesota.

IX.

That on or about June 29th, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from June 29th, 1928, at noon, to June 29th, 1929, at noon, in the amount of $2,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. A61609, and was in the standard form prescribed by the laws of the state of Minnesota.

X.

That on or about July 5th, 1928, said defendant, The Re-

Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from July 5th, 1928, at noon, to July 5th, 1929, at noon, in the amount of $12,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. A61859, and was in the standard form prescribed by the laws of the state of Minnesota.

XI.

That on or about November 22nd, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The insured against loss or damage by fire for a period of one year from November 22nd, 1928, at noon, to November 22nd, 1929, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. A63439, and was in the standard form prescribed by the laws of the state of Minnesota.

XII.

That on or about February 1st, 1929, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain

[illegible]

is the amount of $10,000.00, upon the property specifically described in paragraph VII hereof, which policy was known as No. [illegible], and was in the standard form prescribed by the laws of the state of Minnesota.

XIII.

That on or about August 9th, 1928, said defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from September 1st, 1928, at noon, to September 1st, 1929, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. 22M-5456, and was in the standard form prescribed by the laws of the state of Minnesota.

XIV.

That on or about March [illegible]th, 1929, said defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from March 7th, 1929, at noon, to March 7th, 1930, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. [illegible], and was in the standard form prescribed by the laws of the state of Minnesota.

Hardware Dealers Mutual Fire Insurance Company of Wisconsin, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from April 3rd, 1928, at noon, to April 3rd, 1929, at noon, in the amount of $9,000.00, upon the same property specifically described in paragraph VII hereof, which policy was known as No. H22-529, and was in the standard form prescribed by the laws of the state of Minnesota.

XVI.

That at all of said times all of the aforesaid policies, by their respective terms, permitted other or concurrent insurance, and at all times each of said policies provided for arbitration and contained a provision in words and figures following—that is to say:

"In case of loss, except in case of total loss on buildings, under this policy and a failure of the parties to agree as to the amount of the loss, it is mutually agreed that the amount of such loss shall, as above provided, be ascertained by two competent, disinterested and impartial appraisers who shall be residents of this state, the insured and this company each selecting one within fifteen days after a statement of such loss has been rendered to the company, as herein provided, and in case either party fail to select an appraiser within such time the other appraiser and the umpire selected, as herein provided may act as a board of appraisers and whatever award they shall find shall be as binding as though the two appraisers had been chosen; and the two so chosen shall first select a competent, disinterested and impartial umpire; provided that if after five days the two appraisers cannot agree on such an umpire, the presiding judge of the

District Court of the county wherein the loss occurs may appoint such as umpire upon application of either party in writing by giving five days' notice thereof in writing to the other party. Unless within fifteen days after a statement of such loss has been rendered to the company, either party the assured or the company, shall have notified the other in writing that such party demands an appraisal; such right to an appraisal shall be waived; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of the loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the expenses for the appraisal and umpire. The fees of any appraiser or umpire shall in no case exceed ten dollars ($10.00) per day."

XVII.

That each of said policies provided for co-insurance and contained a co-insurance clause and provision in words and figures following—that is to say:

"In consideration of the acceptance by the insured of a reduction of the established rate of $..... to $....., it is expressly stipulated and made a condition of this contract that the insured shall maintain contributing insurance during the life of this policy upon the property hereby insured to the extent of at least 80% of the actual cash value at the time of the loss, and that failing so to do, the insured shall, to the extent of such deficit bear his, her or their proportion of any loss, and it is expressly stipulated that in case there shall be more than one item or division in the form of this policy this clause shall apply to each and every item."

That as a matter of fact, The Insured did at all times

[illegible]

XVIII.

That all of the property covered and insured by the respective policies hereinbefore mentioned was at all of the times herein mentioned, and was at all of the dates at which said policies, and each of them, were issued, and continued so to be at all times down to and including the fire hereinafter set forth, the property of said owned by The Insured.

XIX.

That in and by each of the policies hereinbefore mentioned, it was provided that if there should be any other insurance on the property insured, whether prior or subsequent, The Insured should recover on said respective policies no greater proportion of loss, whether by fire, lightning, or both, except in case of total loss on buildings, sustained, than the sum in such respective policies, and so insured, bears to the whole amount insured thereon.

XX.

That on March 9th, 1929, and while said policies, and each of them, were in full force, a fire occurred on said premises by reason of which the property in said respective policies described was damaged, and certain thereof totally destroyed. That said loss and damage was in at least the sum of [illegible]

XXI.

[illegible]

Honorable the District Court of the Eleventh Judicial District, state of Minnesota, wherein said property was situated, for an order appointing and designating an umpire for the purpose of and to complete a board of appraisers in conformity with the laws of the state of Minnesota in such case made and provided, and thereupon and on or about said date last mentioned, The Insured caused to be served upon each of said defendants the said petition, and a motion based thereon, for an order appointing an umpire to complete the board of appraisers in said matter, which motion was by its terms made returnable before the above named court, at the court house, in the city of Duluth, county of St. Louis, state of Minnesota, on Saturday, the 13th day of April, 1929, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel could be heard, and which motion was by its terms based upon said petition and affidavit which was thereto attached, and was made for the reason and upon the ground that, within the time fixed thereby by law, the defendants, and each of them, had not named an appraiser so that the two appraisers could agree upon an umpire to serve upon said board of appraisers.

That thereupon and on said April 13th, 1929, at 9:30 o'clock A. M., at the court house, in the city of Duluth, St. Louis county, Minnesota, said motion was duly submitted to and argued before the Honorable Bert Fesler, presiding judge of said court, and said judge on said date duly made and entered his order appointing Thomas M. McCabe, of the city of Duluth, Minnesota, as umpire to make up said board of appraisers in said matter.

That all of said papers relative to the appointment of an umpire have been duly filed with the clerk of the above named court and became and are a record of said court, reference thereto for more particularity being hereby made.

That thereupon and on April 16th, 1929, notice of such appointment of an umpire was duly served upon said defendants, and each of them, at which time said defendants, and each of them, were notified in writing that the said umpire had designated April 19th, 1929, at 10:00 o'clock A. M., as the time, and the umpire's office, in the Torrey Building, in the city of Duluth, Minnesota, as the place for a meeting of the board of appraisers to hear evidence and consider and determine the matter of loss and damage, and to make their award thereon, all in pursuance to their duties as such board of appraisers.

XXV.

That thereupon, and after his appointment, and prior to said arbitration, said umpire duly qualified as such and accepted his appointment and, together with said Rodgers, swore in writing that he and they would act in strict impartiality in all matters of difference that should be submitted to them in connection with the appraisement, and that they would justly perform the duties and trust of umpire and appraiser, respectively, and would make true, just and conscientious award, according to the best of their ability.

XXVI.

That thereupon and at the time and place so designated, and on April 19th and 20th, 1929, the said appraisers and said umpire, after hearing evidence estimated and appraised the loss occasioned by said fire, and thereupon and on said April 20th, 1929, said appraiser Rodgers and said umpire McCabe made an award in writing, by the terms of which, and whereby they found and stated separately that the sound value of the stock of merchandise so damaged and destroyed immediately preceding said fire was $67,600.70, and that the loss and damage thereto occasioned by said fire was $61,600.70, and by the terms of which and whereby they

further found and stated separately that the sound value of the entire furniture and fixtures so damaged and destroyed immediately preceding said fire was $14,000.00, and that the loss and damage thereto occasioned by said fire was $13,364.15, thus making a total loss and damage occasioned by said fire of $74,964.91.

That thereupon and on April 22nd, 1920, written notice of such award, together with a certified copy of said appraisal and award, was duly sent to and served upon said defendants, and each of them.

XXVII.

That said defendants, and each of them, by their respective duly authorized adjusters, immediately after said fire, went to Duluth, Minnesota, proceeded to and did conduct a full and complete investigation of said fire and said loss, but notwithstanding the same, said defendants, and each of them, although being duly notified of all the steps incident to said arbitration and award, failed, neglected and refused to in any way participate therein.

XXVIII.

That more than sixty days have elapsed since the making of said award. That said plaintiffs have demanded and caused to be demanded of said defendants, and each of them, the payment of said award and their respective proportions thereof, but that said defendants, and each of them, have failed, neglected and refused to pay the same, or any part thereof.

XXIX.

That said The Insured and said plaintiffs have performed all the conditions and done all the acts required to be done by them, or either of them, by virtue of said policies, and each of them.

XXX.

That the amount of the liability of each defendant for such loss and award depends upon the liability of the other defendants, and that to adjudge the respective liabilities of the defendants it is necessary at the same time to determine the liability of each, and for this and other reasons, and to prevent a multiplicity of suits, it is necessary to join all of the defendants in this action. That each of said defendants has denied liability.

XXXI.

That The Insured, prior to the commencement of this action, for a good and valuable consideration, assigned, transferred and set over to the plaintiffs all its right, title and interest in and to its said fire loss hereinbefore referred to, and in and to its chose of action against said defendants, and each of them, by reason thereof, and said plaintiffs thereupon became and now are the owners and holders of said loss and chose in action, and entitled to sue thereon.

XXXII.

That by reason thereof, there is now due and owing said plaintiffs from said defendants the sum of $74,964.91, and that said plaintiffs have been damaged in said amount by reason of the premises.

Wherefore, said plaintiffs demand judgment, that said court, taking full and complete jurisdiction in the premises, will determine the liability of each of said defendants, respectively, to the plaintiffs, according to their (said plaintiffs) respective interests, and will order judgment against said defendants, respectively, in this action for such sum as each should respectively pay, in order that the plaintiffs may have and recover the full sum of $74,964.91, with interest thereon, together with their costs and disbursements

KERR, NELSON, BURNS & MOHAN,
1815 Pioneer Building,
St. Paul, Minnesota,
FRYBERGER, FULTON & BOYLE,
712 Lonsdale Building,
Duluth, Minnesota,
Attorneys for Plaintiffs.

(Duly verified.)

(Similar summons and complaint served on each defendant.)

(Title of Cause.)

SEPARATE ANSWER OF DEFENDANT, THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY.

The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, one of the above named defendants, as and for its separate answer to the complaint of plaintiffs herein:

I.

1. Admits all and several the allegations set forth and contained in paragraphs numbered I to XVII, both inclusive, and also in paragraphs numbered XIX, XXII, XXIII, XXV, XXVI and XXX, of plaintiffs' complaint; with the exception of the words "thus making a total loss and damage occasioned by said fire of $74,001.01," occurring at the end of the first paragraph of subdivision XXVI of said complaint, defendant merely admitting in that respect that said loss, namely, $74,001.01, was the total appearing in and under said several

2. Admits that on March 3, 1929, a fire occurred on the premises described in its said several policies, resulting in

[illegible]

3. Admits that this defendant was duly notified of the loss and damage sustained by the insured under said policies, and that thereupon the insured, [illegible] Company (hereinafter referred to as the "insured"), filed upon request of this defendant sworn statements in proof of loss and proofs of loss, signed and sworn to by the insured.

4. Admits that on or about March 28, 1925, insured served upon this defendant a written demand for the arbitration provided for in defendant's said policies, and in said demand selected W. C. Rodgers as insured's appraiser. Admits that said W. C. Rodgers is and was at all of the times mentioned in said complaint a resident of St. Paul, Minnesota. Admits that at all times this defendant refused to appoint or select an appraiser in said arbitration proceedings and admits all and several the allegations contained in the fourth, fifth, sixth and seventh paragraphs of subdivision XXIV of plaintiffs' complaint, with the exception of the word "duly" wherever the same may occur in said last referred to paragraphs of said subdivision.

5. Admits that shortly after the occurrence of said fire this defendant made as full an investigation of said fire and said loss as it was able to do under the circumstances, and further admits that although it was notified of all steps taken incident to said arbitration up to the time of the hearing thereunder, this defendant refused to in any way participate therein, and further admits that this defendant has refused, and still refuses, to pay said plaintiffs or either thereof anything under or upon its said several policies, or under or upon said award.

6. Specifically denies that said insured and/or said plaintiffs, or either or any of the latter, have performed all

[illegible] all the acts required to be done by them, or either of them, by virtue of said policies and each thereof.

7. Further answering this defendant alleges that it has neither knowledge nor information sufficient to form a belief as to whether, prior to the commencement of this action, or at any other time, the insured, for a good and valuable consideration, assigned, transferred and set over to plaintiffs herein, or to either or any thereof, all the right, title and interest of said insured in and to said fire loss hereinabefore referred to, and/or in and to its chose of action against this defendant, by reason thereof; or as to whether or not said plaintiffs, or either or any thereof, thereupon became or now are the owners and holders of said loss and chose in action and entitled to sue thereon; and therefore denies the same and all thereof and puts plaintiffs and each thereof upon proof thereof.

8. Denies that there is now due and owing from this defendant to said plaintiffs, or to either or any thereof, any sum whatsoever.

9. Further answering this defendant denies each and every allegation, matter and thing in said complaint set forth and alleged, save and excepting such as are hereinbefore admitted, qualified, or specifically denied.

II.

10. Further answering, and as and for a first separate affirmative defense herein, defendant repeats and realleges as and several the allegations and matter hereinbefore and in paragraphs numbered 1 to 9, both inclusive, of this answer alleged and contained, and makes the same part hereof as though set forth herein in full.

11. Further answering this defendant alleges that each of the said policy contracts expressly provided that the same

to wit:

That subsequent to said fire said Insured with and for the sole express design and purpose of deceiving and defrauding this defendant, knowingly, wilfully, falsely and fraudulently materially misrepresented and over-valued to this defendant, by written statements, under oath and otherwise, the character, quantity and value of the properties described in the coverage clause of defendant's said policies, and knowingly, wilfully, fraudulently and falsely materially misrepresented and over-valued to this defendant, by written statements, under oath and otherwise, the amount of loss and/or damage sustained to said properties by reason of said fire; all for and with the sole intent and purpose of deceiving and defrauding this defendant and inducing it to pay said Insured a sum largely in excess of that for which this defendant was in anywise liable under its said policy contracts, or any or either thereof.

III.

13. Further answering, and as and for a second separate affirmative defense herein, defendant repeats and realleges all and several the allegations and matter hereinbefore set in paragraphs numbered 1 to 9, both inclusive, of this answer alleged and contained, and makes the same part hereof as though set forth herein in full.

14. Defendant further alleges that the award made and

rendered as aforesaid was wholly illegal and void in this, to-wit: That said award was grossly and materially excessive, in that the amount of loss and/or damage resulting from said fire to the several properties described in defendant's said policy contracts did not exceed the sum of $50,000.00.

IV.

15. Further answering, and as and for a third separate affirmative defense herein, defendant repeats and realleges all and several the allegations and matter hereinbefore and in paragraphs 1 to 9, both inclusive, of this answer alleged and contained, and makes the same a part hereof as though set forth herein in full.

16. Further answering defendant alleges that the arbitration and award alleged in the complaint herein were had under and pursuant to the provisions of the statutes of this state, imposing on all insurance companies doing business in the state the requirement of adopting the so-termed "Standard Form of Policy" prescribed by such statutes. That by the terms of such statutes one of the provisions thereof makes the submission by insurers to such arbitration compulsory, and makes compliance with and recognition of such compulsory arbitration a condition to the right to carry on and conduct the business of insurance in this state.

17. That the statutory conditions last stated prescribing such compulsory arbitration were and are unconstitutional and void as to this defendant, as violative of and contrary to Section 4 of Article I and Section 7 of Article I of the Constitution of this state.

18. That the proceedings of said arbitration and the award alleged and relied on in the complaint herein are illegal and void for the reasons hereinabove and in this separate defense stated.

20. That the statutory conditions hereinabove alleged in so far as the same prescribe compulsory arbitration were and are unconstitutional and void as to this defendant as violative of and contrary to the Fourteenth Amendment of the Constitution of the United States.

21. That the proceedings in said arbitration and the award alleged and relied on in the complaint are illegal and void for the reasons hereinabove and in this separate defense stated.

Wherefore, this defendant prays judgment that neither plaintiffs nor either thereof have and recover anything as against this defendant, and that this defendant have and recover its costs and disbursements herein incurred.

NATHAN H. CHASE and
M. H. BOUTELLE,
603 1st Nat'l Soo Line Bldg.,
Minneapolis, Minnesota,
Attorneys for Defendants.

(Duly verified.)

(Similar answers were interposed by each of the other two defendants.)

[illegible] OF DEFENDANT,
[illegible] DEALERS MUTUAL FIRE INSUR-
ANCE COMPANY OF WISCONSIN

And now come the plaintiffs in the above entitled action, and replying to the separate answer of the defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, and each and every portion thereof, including the first, second, third and fourth separate affirmative defenses therein:

I.

Deny each and every allegation, matter and thing in said separate answer contained, save and except such portions thereof as admit the allegations of the complaint, and save as are hereinafter expressly stated, admitted or qualified.

II.

Admit the allegations contained in paragraph eleven of said answer.

III.

Admit that the arbitration and award alleged in the complaint were had under and pursuant to the provisions of the statutes of the state of Minnesota, and allege that said arbitration and award were also had under and pursuant to the provisions of the policy contract between the parties hereto.

Wherefore, said plaintiffs pray judgment as in their complaint demanded.

KERR, NELSON, BURNS & MOHAN,
1015 Pioneer Building,
St. Paul, Minnesota,
FEYBERGER, FULTON & BOTTLE,
712 Lumber Exchange Building,
Duluth, Minnesota,
Attorneys for Plaintiffs.

other two defendants.

(Title of Cause.)

SETTLED CASE.

The above entitled action came duly on for trial on December 2nd, 1926, before the Hon. Bert Fesler, and a jury. Harold C. Kerr, Esq., of Kerr, Nelson, Burns & Nelson, St. Paul, Minn., and Edward L. Boyle, Esq., of Freyberger, Watson & Boyle, Duluth, Minn., appeared on behalf of plaintiffs, and Messrs. Nathan H. Chase and M. H. Gardner, Minneapolis, Minn., appeared on behalf of defendants. A jury having been duly impanelled, the following proceedings were had:

Mr. Kerr: Plaintiffs offer in evidence Plaintiffs' Exhibits A to I, inclusive, being the original policies involved in this case.

The Court: Received.

PLAINTIFFS' EXHIBIT A.

This is a fire insurance policy of defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, in the Minnesota Standard Form prescribed by and set forth in full in Section 3512 of the Gen. Stat. Minn. 1923, numbered A61866, running for a period of one year from noon on June 29th, 1922, until noon on June 29th, 1923, insuring Stuart Hardware Co. and its legal representatives against loss or damage by fire, in the sum of $2,000.00 and containing the following coverage clause or rider, viz.:

"Uniform Standard Minnesota Form No. [illegible]

(Edition Dec. 20)

On all property (except notes, bills of exchange,

accounts, evidences and securities of property of every kind, money, currency and bullion) usual and necessary to the assured's business; its own or held in trust or on commission, or on consignment, or sold but not removed, or the property of others for which it may be legally liable in event of loss, wardrobe of employers and employees; the assured's interest in improvements and betterments to the building itself; printed books and cards of record and account (at not exceeding cost as blanks and cost of transcribing same), all while contained in the two-story, gravel roof brick building situated at Nos. 102-104-104½ East Superior Street, and 101-103-105 East Michigan Street, and 4-6 South First Avenue East, Duluth, Minnesota, and on or under sidewalks, areaways, porches, platforms, streets, alleys, and/or in or on vehicles within 100 feet, thereof.

Other insurance permitted.

Permission granted for such use of the premises as is usual and incidental in the business, as conducted therein, of retail hardware stores and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

Co-Insurance Clause

In consideration of the acceptance by the insured of a reduction from the established rate of $1.49 to $1.267 it is expressly stipulated and made a condition of this contract that the insured shall maintain contributing insurance during the life of this policy upon the property hereby insured to the extent of at least eighty per cent of the actual cash value at the time of the loss, and that failing so to do, the insured shall to the extent of such deficit bear his, her or

their proportion of any loss, and it is expressly stipulated that in case there shall be more than one item or division in the form of this policy this clause shall apply to each and every item.

This clause, at the request of the insured, is attached to and forms a part of Policy No. A61608 of the Retail Hardware Mutual Fire Ins. Co., issued at its Home Office Agency. Dated 6/29/28.

Siegel Hardware Co. J. B. Siegel Insured

Thos. J. McCracken Sec'y.

Notice: This clause must be signed by both insured and agent. A policy may contain a co-insurance clause only when the entire risk covered by the same amounts to $5,000 or more.

Note to Agents: Agents should caution the insured to see that the amount of insurance carried is equal to the percentage of value stated above, to avoid insured being a contributor under the policy in event of loss.

Waiver Of Inventory Or Appraisement Clause

If this policy shall be subject to the conditions of co-insurance, it is also made a condition that in the adjustment of any loss hereunder, provided same does not exceed 2% of the total insurance carried, it shall not be a part of compliance with the conditions of co-insurance to inventory and/or appraise the undamaged property.

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

The Provisions Printed On The Back Of This Form Are Hereby Referred To And Made a Part Hereof.

Attached to and forming part of Policy No. A61608 of the Retail Hardware Mutual Fire Ins. Co., issued at its Home Office Agency. Dated 6/29/28.

Thos. J. McCracken Sec'y.

PLAINTIFFS' EXHIBITS B TO F.

These are policies of defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, identical in form and coverage with Plaintiffs' Exhibit A, all in force at the time of the fire, and totaling in amount $42,000.00.

PLAINTIFFS' EXHIBITS G TO H.

These are policies of defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, identical in form and coverage with Plaintiffs' Exhibit A, all in force at the time of the fire and totaling in amount $20,000.00.

PLAINTIFFS' EXHIBIT I.

This is a policy of defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, identical in form and coverage with Plaintiffs' Exhibit A, and in force at the time of the fire, in the amount of $9,000.00.

Mr. Kerr: Plaintiffs now offer in evidence Plaintiffs' Exhibits J to A-1.

Mr. Chase: It may be admitted that the sworn statements, represented by Plaintiffs' Exhibits J, L, N, P, R, T, V, W and X, together with the respective letters accompanying them, represented by Plaintiffs' Exhibits K, M, O, Q, S, U, Y, Z and A-1, were all and several received by the several defendants in this case, to whom they were addressed, in due course of mail, at or about the dates that those letters bear, viz., March 16th, 1923.

The Court: Plaintiffs' Exhibits J to A-1 received in evidence.

Plaintiff's Exhibit A is as follows:

"Sworn Statement

Policy No. A 60794 Amount of policy, $2,000.00

To The Retail Hardware Mutual Fire Insurance Company Of Minnesota:

By Your Policy Of Insurance No. A 60794, issued at your Minneapolis Agency, commencing the 2nd day of May, 1926, and expiring the 2nd day of May, 1929, at 12 o'clock noon, you insured Siegel Hardware Company, a corporation, against loss or damage by fire or lightning to the amount of Two Thousand Dollars according to the terms and conditions printed therein.

Siegel Hardware Company

$2,000.00 On all property (except notes, bills of exchange, accounts, evidences of any securities of property of every kind, money, currency and bullion) usual and necessary to the assured's Business; its own or held in trust or on commission, or on consignment or sold but not removed, or the property of others for which it may be legally liable in event of loss; wardrobe of employers and employees; the assured's interest in improvements and betterments to the building itself, printed books, and cards of record and account (at not exceeding cost as blanks and cost of transcribing same), all while contained in the two-story gravel roof, brick building, situated at Nos. 100-101 East Superior Street and 104½ E. Superior Street, and 101-103-105 East Michigan Street, and 4-6 South First Avenue East, Duluth, Minnesota, and on or under sidewalks, areaways,

[illegible] AGAINST LOSS BY FIRE, LIGHTNING AND TORNADO COMPANIES

porches, platforms, areaways, alleys and/or in or on vehicles within 100 feet thereof.

80% co-insurance clause attached.

The Value of the property insured under said policy, at the time immediately preceding the fire hereinafter mentioned was, as this affiant believes about Ninety Thousand Dollars.

The Interest of the insured in said property was as follows: sole owner.

All Other Insurance thereon was and is as follows:

(No. of policy)	(Date of Expiration of Policy)	(Name of Company)	(Amount of Policy)
A61859	July 5, 1929	The Retail Hardw. Mutual Fire Ins. Co...	$13,000.00
A61418	May 31, 1929	The Retail Hardw. Mutual Fire Ins. Co...	7,000.00
A61292	Feb. 1, 1930	The Retail Hardw. Mutual Fire Ins. Co...	10,000.00
A61003	June 29, 1929	The Retail Hardw. Mutual Fire Ins. Co...	9,000.00
A63489	Nov. 22, 1929	The Retail Hardw. Mutual Fire Ins. Co...	10,000.00
22M5456	Sep. 1, 1929	Minn. Implt. Mutual Fire Ins. Co.....	10,000.00
22M6318	Mar. 1, 1930	Minn. Implt. Mutual Fire Ins. Co.....	10,000.00
M 22528	Aprl. 1, 1929	Hardware Dealers Mutual Fire Ins. Co.	9,000.00

The Purposes for which, and the Persons by whom, the building insured, or containing the property insured, was occupied so far as known to this affiant, were as follows: Hardware Stores.

A fire occurred on the 9th day of March, 1930, about the

[illegible] by the [illegible] of the [illegible]

[illegible] of the [illegible] of [illegible], by which the property described in said policy was [illegible] or damaged, said fire originating, so far as known to the assured, [illegible] and no knowledge whatsoever with reference as to the origin of the fire.

Witness my hand at Duluth, this 16th day of March, 1920.

Siegel Hardware Company
By J. B. Siegel
Secretary and Assured.
Treasurer

State Of Minnesota)
) ss.
County of St. Louis)

Be It Remembered, that on the 16th day of March, 1920, personally appeared Joseph Siegel, who, being by me duly sworn, on oath did say that he is the same person who executed the foregoing statement—that he is a member of the firm, Siegel Hardware Co., of the corporation—which is the assured in the policy of insurance within described, and duly authorized to execute the foregoing statement—and the same is true.

Siegel Hardware Company
By J. B. Siegel
Secretary and Treasurer

Subscribed and sworn to before me this 16th day of March, 1920.

A. B. Clarfield
Albert B. Clarfield
Notary Public,
St. Louis County, Minn.

(Notarial Seal)

My Commission Expires May 13, 1923.

Plaintiffs' Exhibits L, N, P, R, T, V, W and X, are in similar form, representing "Sworn Statements" thus mailed to the several defendants, in connection with each of the policies thus issued by them.

PLAINTIFFS' EXHIBIT K.

Plaintiffs' Exhibit K is a letter accompanying the Sworn Statement, Plaintiffs' Exhibit J, and reads as follows:

"Albert B. Clarfield
Attorney at Law
407-408 First National Bank Bldg.,
Duluth, Minn.
March 16, 1929

The Retail Hardware Mutual
Fire Insurance Co. of Minn.
Minneapolis, Minnesota

In re: Policy No. A 60794
for $2,000.00, Siegel
Hardware Co. assured.

Gentlemen:

We are sending inclosed herewith sworn statement, notifying you of the fire that occurred March 9, 1929, by which the property described in said policy was destroyed and damaged.

Kindly acknowledge the receipt of the same.

Yours very truly,
By J. Supornick
J. Supornick
Adjustor for the Assured
Guaranty Building
St. Paul, Minnesota."

identical with Plaintiffs' Exhibit K, being letters to each of the foregoing referred to as sworn statements. Exhibits M, O, Q, Sand U are all addressed to Retail Hardware Mutual Fire Insurance Company of Minnesota, Minneapolis, Minnesota. Exhibits Y and Z are each addressed to Minnesota Implement Mutual Fire Insurance Company of Minnesota, Owatonna, Minnesota, and Exhibit A1 is addressed to Hardware Dealers Mutual Fire Insurance Company of Wisconsin, Stevens Point, Wisconsin.

JOSEPH SUPORNICK,

sworn on behalf of plaintiffs.

DIRECT EXAMINATION.

By Mr. Kerr:

I am 43 years of age, and reside in St. Paul, Minnesota, where I am engaged in the business of adjusting insurance losses for the policy holders; having been in that line of business 17 years last past.

After a policy holder has a fire loss he employs me as an adjustor to represent him in connection with the loss, in the matter of estimating the same, making an inventory, and notifying the companies of the kind of loss and approximately as to the value of the property involved, and adjusting the losses with the companies.

I acted as such adjustor for the Siegel Hardware Co. in connection with this loss that it sustained on March 9th, 1929; and am also one of the plaintiffs in this action. The defendant, Insurance Companies, also had adjustors representing them, one of whom was Charles Wright.

The letter, Plaintiffs' Exhibit B-1, was signed and mailed by me on or about the date it bears.

Mr. Chase: Admitted that Plaintiffs' Exhibit B-1 was re-

received by the parties to whom it was addressed, in due course of mail.

Plaintiffs' Exhibit B-1 offered and received in evidence without objection; reading as follows:

PLAINTIFFS' EXHIBIT B-1.

"Joseph Supornick
Adjuster for the
Insured
712-713 Guardian Building

Saint Paul, Minn.
March 26th, 1929.

Mr. C. G. Wright, Adjuster
for
Hardware Dealers Mutual Fire Ins. Co.,
and
Minnesota Implement Mutual Fire Ins. Co.,
and
Retail Hardware Mutual Fire Insurance Co.,
422 Providence Building,
Duluth, Minn.
Dear Sir:

Re: Loss—Seigal Hardware Company,
Duluth, Minnesota.

Since we are unable to agree with you as to the amount of loss and damage sustained to the stock, fixtures and debris of the above named assured, and insured in the policies mentioned herein, by fire, which occurred on March 9th, 1929, I hereby demand that the amount of said loss and damage be determined by appraisers, as provided by the terms and conditions of the policies, and hereby nominate and appoint as one of the appraisers to act in said matter, Mr. W. C. Rodgers, c/o N. W. Jobbers Credit Bureau, Endicott Building, St. Paul, Minn.

appraiser appointed by you.

Very truly yours,

Jos. Sapovich,

Adjuster for the Insured.

Witness: I was present in Duluth at the time of the appraisal proceedings, commencing on April 19th and finishing on April 20th, on which last day the award was rendered.

Mr. Kerr: Plaintiffs offer in evidence Plaintiffs' Exhibit C-1, being the original motion and application for appointment of an umpire, taken from the files of the clerk of this court, with the affidavits of return of service thereon together with the clerk's stamp of filing.

Mr. Chase: Objected to on the grounds that it is incompetent, irrelevant and immaterial.

Objection overruled. Exception.

PLAINTIFFS' EXHIBIT C-1.

State of Minnesota — District Court

County of St. Louis — Eleventh Judicial District

In the matter of the application of the Siegel Hardware Company, a Corporation, Applicant,

vs.

Hardware Dealers Mutual Fire Insurance Company, a Corporation; Minnesota Implement Mutual Fire Insurance Company, a Corporation, and the Retail Hardware Mutual Fire Insurance Company of Minnesota, a Corporation, Respondents.

For the appointment of an umpire under and pursuant to Chapter 121 of the General Laws of the State of Minnesota for the year 1913, General Statutes 1913, Section 3818.

[illegible] Hardware Dealers Mutual Fire Insurance Company, a Corporation, Minnesota Implement Mutual Fire Insurance Company, a Corporation, and the Retail Hardware Mutual Fire Insurance Company of Minnesota, a Corp.:

You are hereby notified that the within and annexed Petition and Application will be submitted to and brought on for hearing before the presiding Judge of the above entitled Court at a special term thereof, appointed to be held at the Court House in the City of Duluth, County of St. Louis, State of Minnesota, on Saturday, the 13th day of April, 1929, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at which time and place a Motion will be made herein by and on behalf of the applicant for an order appointing an umpire to complete the board of appraisers mentioned and described in said petition according to the statute in such cases made and provided.

Said Motion will be based upon the annexed petition and application and for the reason and upon the ground that within the time allowed therefor by law, the respondents did not name an appraiser, so that the two appraisers could agree upon an umpire to serve upon said board of appraisers.

Kerr, Nelson, Burns & Mohan,
1615 Pioneer Building,
St. Paul, Minn.,
Attorneys for Applicant.

State of Minnesota
County of St. Louis

District Court
Eleventh Judicial District

In the matter of the application of the Siegel Hardware Company, a Corporation,

Applicant,

vs.

Hardware Dealers Mutual Fire Insurance Company, a Cor-

For the appointment of an umpire under and pursuant to Chapter 421 of the General Laws of the State of Minnesota for the year 1913, General Statutes 1913 Section [illegible]

To The District Court In And For The County of St. Louis, State of Minnesota:

Your petitioner, Siegel Hardware Company, a Corporation, with its principal place of business in the City of Duluth, State of Minnesota, respectfully shows and states:

I.

That during all the time hereinafter mentioned, the Hardware Dealers Mutual Fire Insurance Company, the Minnesota Implement Mutual Fire Insurance Company and the Retail Hardware Mutual Fire Insurance Company of Minnesota, were Corporations duly licensed to transact the business of fire insurance within the State of Minnesota.

II.

That prior to the 9th day of March, 1929, said Insurance Companies did each insure the applicant under separate policies of fire insurance, written upon the Minnesota Standard form of fire insurance policy against loss and damage by fire to certain personal property consisting generally of a stock of hardware and sporting goods, also store fixtures and general equipment, all located and situated in its store building at 100-101 East Superior Street, in the City of Duluth, State of Minnesota, said personal property being then and there owned and held by the applicant.

III.

106 That said policies were in full force and effect on said day, 9th day of March, 1929, and that on said date a fire occurred, causing loss and damage under and within the provisions of said policies and each of them to the said personal property described in and covered thereby.

IV.

That following the date of the said loss and damage by fire, and on the 16th day of March, 1929, sworn statements were duly and regularly rendered to the Hardware Dealers Mutual Fire Insurance Company, the Minnesota Implement
107 Mutual Fire Insurance Company and the Retail Hardware Mutual Fire Insurance Company of Minnesota, in accordance with the terms and conditions of their said policies. That also on the 21st day of March, 1929, proofs of loss were duly and regularly rendered to the said Insurance Companies.

V.

That subsequent to the date of said fire, a disagreement between the said applicant and the said insurance companies, and each of them, arose as to the amount of the said loss and damage, and that your applicant did thereafter and on
108 the 26th day of March, 1929, in writing duly demand of said respondent, that the amount of said loss and damage be ascertained and determined by arbitration in accordance with the terms, provisions and conditions of the said policies, and each of them; that in and by said demand, W. C. Rodgers, Esq., of the City of St. Paul, County of Ramsey, State of Minnesota, was designated to act as an arbitrator or appraiser.

VI.

That since the said 26th day of March, 1929, and up to the present time, the fourth day of April, 1929, the respon-

and wholly failed to comply therewith by causing [illegible] praisers within the time limit prescribed by the laws of the State of Minnesota and the terms and conditions of said policies.

VII.

That your applicant is desirous of having such loss and damage appraised by a board of appraisers in accordance with the terms and conditions of said policies in such cases made and provided.

Wherefore, your applicant prays the Order of the Court appointing and designating an umpire for the purpose of and to complete a board of appraisers in the premises in conformity with Chapter 421 of the General Laws of the State of Minnesota, for the year 1913 (General Statutes 1913, Section 2318) and authorizing and directing the said board so completed to proceed with the appraisal of loss and damage suffered and sustained by applicant herein under said policies of fire insurance and for such other and further order as to the court shall seem just and proper.

Kerr, Nelson, Burns & Mohan,
Attorneys for Applicant.

State of Minnesota
ss.
County of Ramsey

Harold O. Kerr, being first duly sworn, deposes and says that he is the attorney for the applicant herein; that he has read the foregoing petition and knows the contents, and that the same is true of his own knowledge, and that the reason why he makes this verification is because applicant herein is not within the County of Ramsey.

Harold O. Kerr.

1928.

(Notarial Seal)

My Commission expires Feb. 22nd, 1931.

(Endorsed)

Filed in My Office At ... o'Clock ... M., Apr. 16, 1928.

P. Johnson, Clk. Dist. Court, By C. L. Weber, Deputy.

(Service on Hardware Dealers Mutual Fire Ins. Co. of Wisconsin, is admitted to have been duly made on Minnesota Insurance Commissioner, on April 6th, 1928.)

Mr. Kerr: Plaintiffs offer in evidence Plaintiffs' Exhibit D-1, taken from the same file.

Mr. Chase: Same objection.

Objection overruled. Exception.

PLAINTIFFS' EXHIBIT D-1.

State of Minnesota } District Court
County of St. Louis } Eleventh Judicial District

In the matter of the application of the Siegel Hardware Company, a Corporation,

Applicant,

vs.

Hardware Dealers Mutual Fire Insurance Company of Wisconsin, Minneapolis Implement Mutual Fire Insurance

[illegible] INSURANCE COMPANIES

[illegible] Corporation, and the Retail Hardware Mutual Fire Insurance Company of Minnesota, a Corporation,

Respondents.

Order.

The application of the above named Applicant for the appointment of an umpire to make up a board of appraisers provided for in the policies of insurance in the above entitled matter, duly came on for hearing before the undersigned in the Court House in the City of Duluth, State of Minnesota, said county, on the 13th day of April, 1929, applicant appearing by Thos. A. Galt, one of its attorneys, and the Court having heard the statements of counsel and being advised in the premises, it is hereby

Ordered, that Thomas M. McCabe, of the City of Duluth, State of Minnesota, be and hereby is appointed as Umpire to make up the board of appraisers hereinbefore referred to.

Dated this 13th day of April, 1929.

Bert Fesler,

Judge.

(Endorsed)

Filed In My Office At....o'clock...M., April 15, 1929. J. P. Johnson, Clk. Dist. Court. By G. L. Wedan, Deputy.

Mr. Chase: Receipt of Plaintiffs' Exhibits C-1 and D-1 admitted by defendants.

THOMAS M. McCABE,

sworn on behalf of plaintiffs

DIRECT EXAMINATION.

By Mr. Kerr:

I am the person who was appointed umpire in the arbitration proceedings between the Hogel brothers [illegible] Plaintiffs' Exhibits B-1, B-1, C-1 and D-1 are letters written by me to

Baker & Wright, my signatures being attached as Umpire to respective exhibits, all of which were written by me and mailed on April 16th, 1929.

Mr. Chase: Receipt of these letters in due course of mail by the several parties to whom they were addressed, is admitted.

Mr. Kerr: Plaintiffs' Exhibits E-1 to H-1, inclusive, are offered in evidence.

Mr. Chase: Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

PLAINTIFFS' EXHIBIT E-1.

"Law Offices Of
Heitmann, McCabe, Gruber & Clare
Seventh Floor Torrey Building
Duluth, Minnesota

April 16, 1929

Retail Hardware Mutual Fire Insurance
Co. of Minn.
2344 Nicollet Avenue,
Minneapolis, Minn.

Re: Appraisal to determine the loss of
Siegel Hardware Company.

Gentlemen:—

The undersigned has been appointed Umpire of the Board of Appraisers to determine the loss in the above entitled matter.

You are hereby notified that the Board of Appraisers will meet for the purpose of receiving evidence and determining the loss in the above entitled matter and for such other matters as will properly come before it, at the office of the

[illegible] Terrey Building, at 10:00 o'clock A. M. [illegible] April 18, 1920. You are hereby notified of the said meeting and you are requested to appear if you desire to be heard in the said matter.

Very truly yours,

Thomas M. McCabe,

T. M. McCabe, duly appointed Umpire."

Exhibits F-1, G-1 and H-1 are identical with Plaintiffs' Exhibit E-1, being addressed to and received by, respectively, the other two defendants and Main, Baker & Wright.

Witness: The appraisal proceeding, referred to in the above exhibits, commenced at 10:00 o'clock A. M., on Friday, April 16th, 1920. Paper marked "Plaintiffs' Exhibit I-1" is the original award made in this appraisal proceeding, signed by Mr. Rodgers, in my presence, and myself, on the date it bears, viz., April 20th, 1920.

Mr. Kerr: Plaintiffs' Exhibit I-1 offered in evidence.

Mr. Chase: Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

PLAINTIFFS' EXHIBIT I-1.

In the Matter of Appraisal proceeding by a Board of Appraisers consisting of W. C. Rodgers, selected by the insured as an appraiser and Thomas M. McCabe appointed by the Court as Umpire to determine the actual value of the stock of merchandise and store furniture and fixtures of the Siegel Hardware Company, Duluth, Minnesota, and the amount of loss and damage to said stock of merchandise and said store furniture and fixtures resulting from fire occurring March 2, 1920.

To [illegible] Insurance Companies [illegible]

Corporation, Minneapolis Implement Mutual Fire Insurance Company, a Corporation, and the Royal Hardware Mutual Fire Insurance Company of Minnesota, a Corporation, and Siegel Hardware Company, a Corporation of Duluth, Minn.

We, the undersigned, Thomas M. McCabe and W. [illegible] Rodgers, constituting a board of Appraisers in the above entitled matter, having given due notice to the parties concerned, of the time and the place of the sitting of said Board of Appraisers in the above entitled matter, for the purpose of estimating and appraising said loss and damage and actual value of said merchandise and said store furniture and fixtures preceding said fire and the said insured having in accordance therewith duly appeared before said board, and having presented evidence on all questions involved and after full and careful consideration of all of the evidence adduced as to said loss and damage and the actual damage of said stock of merchandise and said furniture and fixtures at the time when said loss and damage happened Do Hereby Find, Determine And Award the following:

That the actual value of the stock of merchandise located and contained on the premises 100-101 East Superior, Duluth, was the sum of $67,600.76.

That the loss and damage thereto occasioned by said fire is the sum of $61,600.76.

That the actual value of the store furniture and fixtures located and contained in the premises 100-101 East Superior Street, Duluth, Minn., was the sum of $14,000.00.

That the loss and damage thereto occasioned by said fire is the sum of $12,564.15.

In Testimony Whereof, we do hereby subscribe our names

at St. Paul, Minn., this 20th day of April, 1929.

Thomas M. McCabe, Umpire.
W. C. Rodgers, Appraiser.

Witness excused.

Mr. Kerr: Plaintiffs offer in evidence Plaintiffs' Exhibits J-1, K-1, L-1 and M-1, being letters dated and mailed on April 16th, 1921, by myself, and notifying the defendant companies and their adjustors of the appointment of the umpire by the District Court of St. Louis county, Minnesota, and of the hearing under the appraisement proceeding.

Mr. Chase: Subject to the objection that they are incompetent, irrelevant and immaterial, receipt of these respective exhibits is acknowledged in due course of mail, by the several defendants and their adjustors.

Objection overruled. Exception.

PLAINTIFFS' EXHIBIT J-1.

Kerr, Nelson, Burns And Mohan
Attorneys At Law
1014-15-16 Pioneer Building,
Saint Paul, Minnesota

April 16th, 1929.

Minnesota Implement Mutual Fire Insurance Company,
Owatonna, Minnesota.

In re Siegel Hardware Company.

Gentlemen:

We enclose and herewith serve upon you notice of order entered by Judge Fesler on the 13th inst., appointing Thomas M. McCabe of Duluth, as umpire to make up the Board of Appraisers in the above loss.

We understand that Mr. McCabe is today calling a meeting of the Board to take up the matter at his office in Du-

luth, Minnesota, on Friday, April 19th, 1929, at 10:00 o'clock A. M.

Yours very truly,
Kerr, Nelson, Burns & Mohan,
By: Kerr."

Plaintiffs' Exhibits K-1, L-1 and M-1 are letters of similar tenor to Exhibit J-1, addressed to and received by, respectively, the other two defendants and the adjustors, Main, Baker & Wright.

Mr. Kerr: Plaintiffs offer in evidence Plaintiffs' Exhibits N-1, O-1 and P-1, being letters written by me to the respective defendant companies, dated April 22nd, 1929, advising them of the award, and enclosing a copy of the award.

Mr Chase: Subject to the objection that they are incompetent, irrelevant and immaterial, it is admitted that the several defendants received these letters, and the accompanying copies of the award, in due course of mail; and that Main, Baker & Wright received similar letter and copy of award.

Objection overruled. Exception.

PLAINTIFFS' EXHIBIT N-1.

"Kerr, Nelson, Burns And Mohan
Attorneys At Law
1614-15-16 Pioneer Building,
Saint Paul, Minnesota

April 22nd, 1929.

Hardware Dealers Mutual Fire
Insurance Company of Wisconsin,
Stevens Point, Wisconsin.

In re Siegel Hardware Company:

Gentlemen:

This is to advise you that the Board of Appraisers, con-

[illegible] Insurance Company

[illegible] of W. C. Hodges, appraiser for the insured, and Thomas M. McCabe, umpire appointed by the District Court, Eleventh Judicial District, completed their appraisal in the above matter on the 20th inst., and made the following determination and award:

Actual value of stock of merchandise..... $67,500.7
Loss and damage thereto..... 51,000.7
Actual value of store furniture and fixtures..... 14,000.0
Loss and damage thereto..... 13,564.1

We enclose and herewith serve upon you a certified copy of the appraisal and award, which is self-explanatory.

We are attorneys for the assured and hereby demand from you the payment of the loss and damage to the merchandise and fixtures as found and awarded by the appraisers.

Yours very truly,

Kerr, Nelson, Burns & Mohan

By: Kerr.2

Plaintiffs' Exhibits O-1 and P-1 are identical with Plaintiffs' Exhibit N-1, and each of said three letters was accompanied by a copy of the award, which is set forth in Plaintiffs' Exhibit I-1.

JOHN SIEGEL,

sworn on behalf of plaintiffs.

DIRECT EXAMINATION.

By Mr. Kerr:

I reside in Duluth, Minnesota, and am a stockholder and officer of Siegel Hardware Company, that sustained this fire loss on March 9th, 1922. I have examined documents marked Plaintiffs' Exhibits Q-1 to Y-1, inclusive, and that is my signature attached to each one of them. I signed these instruments, and each thereof, on behalf of the Siegel Hard

gave them to Mr. Supornick, one of the assignees.

Mr. Chase: It is stipulated that Plaintiffs' Exhibits Q-1 to Y-1, inclusive, were received in due course of mail by the respective defendants, and they may be received without objection.

Mr. Kerr: Plaintiffs' Exhibits Q-1 to Y-1, inclusive, offered in evidence.

PLAINTIFFS' EXHIBIT Q-1.

State of Minnesota

ss.

County of Ramsey

In consideration of one dollar cash in hand paid this day I do hereby transfer, set over and assign to Glidden Paint Company and Joseph Supornick all my right, title and interest in a certain fire loss of March 9th, 1929, at 3:30 P. M., on property covered by Policy No. A 64282 Retail Hardware Mut. Fire Ins. Co., located Minnesota, and I do by these presents further appoint, authorize and empower the said Glidden Paint Company and Joseph Supornick in my name, and for me to sign, any and all my proofs of loss on said fire and to sign receipt and endorse in my name for all drafts on said loss and I do forever hereby discharge the said Retail Hardware Mutual Fire Insurance Company from any claims whatsoever on my part as far as this loss is concerned, and do authorize them to pay said loss to Glidden Paint Company and Joseph Supornick and accept my signature made by them as Attorneys in Fact by this Power of Attorney.

It is hereby understood and agreed that this assignment covers this fire loss only and not the policy itself.

Given under my hand and seal this 8th day of May, 1929,
142 in the City of St. Paul, Minnesota.

Witnesseth: Siegel Hardware Co., Assured,
Joseph W. Lindeke By John Siegel, Pres.

Personally appeared John Siegel, signor of the foregoing instrument, who made solemn oath to the truth of the same and that no material fact is withheld that the said Company should be advised of.

Subscribed and sworn to before me the day and date above written.

Irving Lampert
143 Irving Lampert
(Notarial Seal) Notary Public,
Ramsey County, Minn.

My commission expires July 5, 1935.

Plaintiffs' Exhibits R-1, S-1, T-1, U-1, V-1, W-1, X-1 and Y-1, are of similar tenor, as each refer to one of the policies of defendants outstanding at the time of the fire.

Mr. Kerr: Plaintiffs offer in evidence Plaintiffs' Exhibits Z-1, A-2 and B-2, being letters mailed on May 14th, 1929, to each of the defendants, advising them of the foregoing assignments to Supornick and the Glidden Paint Company, and enclosing duplicate originals of such assignments.

144 Mr. Chase: No objection, and receipt thereof by the several defendants admitted.

PLAINTIFFS' EXHIBIT Z-1.

Kerr, Nelson, Burns And Mohan
Attorneys At Law
1614-15-16 Pioneer Building
Saint Paul, Minnesota

May 14th, 1929.

Retail Hardware Mutual Fire Insurance
Company of Minnesota,
2344 Nicollet Avenue,
Minneapolis, Minnesota.
Gentlemen:

In re: Siegel Hardware Company Fire Loss—
Policies Nos. A-61608, A-60794, A-61359,
A-61410, A-64292 and A-63439:

The interest of the Siegel Hardware Company, arising by virtue of its recent fire loss, has been assigned to the Glidden Paint Company and Joseph Suporsick, of this City, and we enclose and herewith serve upon you original assignment, which is self-explanatory.

We are the attorneys for the assignees, as well as for the Siegel Hardware Company, and in the future you will kindly take up with us any matters that may arise in regard to this fire loss.

Yours very truly,
Kerr, Nelson, Burns & Mohan,
By: Kerr."

Plaintiffs' Exhibits A-2 and B-2 are of similar tenor, addressed to and received by the other two defendants.

Witness: Siegel Hardware Company, a corporation, was owner of the property destroyed and damaged by the fire in question.

JAY E. MARKLE,

sworn on behalf of plaintiffs.

DIRECT EXAMINATION.

By Mr. Boyle:

I reside in Duluth, Minnesota, and am cashier of the Bank of Commerce and Savings, having been connected with that bank for six years. The Siegel Hardware Company is a

customer of our bank, and after the fire of March 9th, 192
the bank received from Siegel Hardware Company the doc
ment you have handed to me, marked Plaintiffs' Exhibit C-
The signatures thereto are those of John Siegel and J.
Siegel. I am acquainted with these signatures as they a
customers of our bank. Later on the bank received fro
Siegel Hardware Company another document, which ha
been marked Plaintiffs' Exhibit D-2, which bears the signa
ture of Joe Siegel.

HARVEY D. SEDGWICK,

149 sworn on behalf of plaintiffs.

DIRECT EXAMINATION.

By Mr. Boyle:

I reside in Duluth, Minnesota, and am employed by
Marshall-Wells Company, wholesale hardware, as treasure
and credit manager, which positions I have held for approxi
mately 25 years. At the time of the fire, on March 9th, 192
Siegel Hardware Company was a customer of the Marshal
Wells Company, and indebted to us. Shortly after the fir
we received from Siegel Hardware Company the paper yo
have handed to me, marked Plaintiffs' Exhibit E-2, and
150 made copies of this Plaintiffs' Exhibit E-2, and mailed on
to each of the defendant Insurance Companies, and to Mah
Baker & Wright, said copies being documents handed to m
marked, respectively, Plaintiffs' Exhibits F-2, G-2 and H-
At the same time I wrote each defendant company, an
Mahr, Baker & Wright a letter, said letters being document
handed to me, marked, respectively, Plaintiffs' Exhibits I
to I-2, inclusive.

Mr. Chase: It is admitted that the several letters a
documents accompanying them were received in due cours
of mail, by the several parties to whom they were addressed

Mr. Boyle: Plaintiffs offer in evidence Plaintiffs' Exhibit C-2.

Mr. Chase: Objected to as incompetent, irrelevant and immaterial, being nothing more or less than an offer, there being no evidence of any acceptance on the part of the defendants.

Mr. Boyle: With Plaintiffs' Exhibit C-2 we will offer Plaintiffs' Exhibit D-2. We will offer them together if there is any question about it. E-2, F-2, G-2 and H-2 are all the same as C-2, being duplicate originals; E-2 being the one in the files of the Marshall Wells Company, C-2 being the one in the files of the bank, and F-2, G-2 and H-2 being the ones in possession of the Insurance Companies.

Mr. Chase: Same objection made to them as was made to Plaintiffs' Exhibit C-2.

Mr. Boyle: C-2 is the first exhibit that has been referred to, together with Plaintiffs' Exhibit D-2.

The Court: I understand counsel for plaintiffs is desirous of offering two papers, as constituting in themselves a complete exhibit.

Mr. Bontelle: It does not seem proper to offer each separately and jointly. Exhibit C-2 is merely an order by the insured to the insurers to pay a certain sum, and, not having been accepted, has no legal effect in law. There is a separate objection to Exhibit D-2 because in matter of time, at the time this second instrument was made out, the entire cause of action had already been assigned under the exhibits that have already been received in evidence in this case. In other words, the exhibits in evidence here, offered on behalf of plaintiffs, are outright assignments antedating Exhibit D-2; consequently, if those were valid there was nothing left for the Siegel Hardware Company to assign under Exhibit

154 at the time that instrument was executed, whatever that may be.

Now, as far as Exhibit C-2 is concerned, I have already stated our position. These matters are important as they go to the competency of the parties to those instruments as parties plaintiff in this case; whether they have any standing as such, or not.

Mr. Boyle: I will ask witness for the letters that the Marshall Wells Company afterwards received from the defendant, Insurance Companies.

Witness: Documents marked Plaintiffs' Exhibits M-2, N-2 and O-2, are letters that came to Marshall Wells Company in due course of mail in answer to our letters, I-2, J-2 and K-2; I do not recall that we received any answer from Main, Baker & Wright.

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Mr. Boyle: We now offer in evidence Plaintiffs' Exhibits I-2, J-2, K-2, L-2, M-2, N-2 and O-2.

Mr. Chase: Plaintiffs' Exhibits M-2, N-2 and O-2 are objected to as incompetent, irrelevant and immaterial, and the same objection to Plaintiffs' Exhibits I-2, J-2, K-2 and L-2.

The Court: I think I understand the point that is made by counsel, but do not know as I understand the law with reference to it.

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Here followed argument by respective counsel.

The Court: The best I can say about the point now, Gentlemen, is, if it is good, it is good at any point of the case. We will not take the time now to dispose of it further than to overrule the objection as to the exhibits, and let the record stand that way.

Mr. Chase: Exception.

PLAINTIFFS' EXHIBIT C-2

Duluth, Minnesota,
March 20, 1922

To The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, The Retail Hardware Mutual Fire Insurance Company of Minnesota, Minnesota Implement Mutual Fire Insurance Company:

Gentlemen:

You are hereby requested and ordered to pay to Marshall Wells Company $11,800.00 and to the Bank of Commerce & Savings, Inc., of Duluth $13,500.00 out of the moneys due or to accrue to the Siegel Hardware Company upon the company's insurance policies, for loss upon its stock of goods and fixtures at 102-104 East Superior Street in the City of Duluth, and charge the same to the Siegel Hardware Company; and the Siegel Hardware Company does hereby assign and set over unto said Marshall Wells Company the sum of $11,800.00 and to said Bank of Commerce & Savings, Inc., the sum of $13,500.00 out of said moneys due or to accrue upon said insurance policies.

Siegel Hardware Company
By John Siegel
Its President
J. B. Siegel
Its Secretary.

Witnesses:
H. C. Fulton
A. B. Croupeid.

Plaintiffs' Exhibits E-2, F-2, G-2 and H-2 are identical in form with Plaintiffs' Exhibit C-2.

PLAINTIFFS' EXHIBIT I-2.

"March 20th, 1922.

The Hardware Dealers Mutual
Fire Insurance Co. of Wisconsin,
Stevens Point, Wisconsin.

Gentlemen:

We hand you herewith order and assignment from Siegel Hdwe. Co., Duluth, Minnesota, in the amount of $25,300.00 payable to order of Marshall-Wells Co., $11,800.00, and Bank of Commerce & Savings, Inc., $13,500.00, said funds to be paid to the above order from moneys to accrue to the said Siegel Hdwe. Co. under policies on recent fire loss.

Kindly acknowledge receipt of said assignment and order using the enclosed envelope for that purpose.

Yours truly,

Marshall-Wells Company,

Credit Department."

Plaintiffs' Exhibits J-2, K-2 and L-2 are identical with Plaintiffs' Exhibit I-2, being similar letters sent to the other two defendants, and to Main, Baker & Wright.

PLAINTIFFS' EXHIBIT D-2.

"In Consideration of One Dollar ($1.00) to Siegel Hardware Company in hand paid by Bank of Commerce & Savings and by Marshall-Wells Company, the receipt whereof is hereby acknowledged, Siegel Hardware Company does hereby assign, sell and set over to Marshall-Wells Company Eleven Thousand Eight Hundred ($11,800.00) Dollars and to the Bank of Commerce & Savings, Inc., of Duluth, Thirteen Thousand Five Hundred ($13,500.00) Dollars out of the moneys due or to accrue to the Siegel Hardware Company upon the company's insurance policies for loss upon

Fire Insurance Company of Wisconsin, the Retail Hardware Mutual Fire Insurance Company of Minnesota, Minnesota Implement Mutual Fire Insurance Company. This assignment is given by virtue of indebtedness which is and was owing by the undersigned at the time of the fire to the assignees herein, in the above amounts.

June 26th, 1929. — Siegel Hardware Company,
By J. B. Siegel."

PLAINTIFFS' EXHIBIT M-2.

"Hardware Dealers Mutual
Fire Insurance
Company
Stevens Point, Wisconsin

March 22, 1929.

Marshall-Wells Company
Duluth, Minnesota
Mr: S. D. Carrier, Credit Department

We acknowledge receipt of order and assignment from Siegel Hardware Company, Duluth, to yourselves and the Bank of Commerce and Savings, Inc.

We are forwarding this document on to our Minneapolis Office who have the matter of payment at hand, and they will bear it in mind in considering any remittance to these assureds.

Yours very truly,
Hardware Dealers Mutual Fire Ins. Co.
F. J. Pfiffner,
Superintendent of Losses."

166 PLAINTIFFS' EXHIBIT N-2.

"Retail Hardwa[illegible]
Mutual Fire Insurance Co.
of Minnesota.
Nicollet Avenue at 24th Street,
Minneapolis, Minn.

March 21, 1929.

Marshall-Wells Company
Duluth, Minn.
Attn: S. R. Carrier

Loss: Siegel Hardware Co.
167 Duluth, Minn.

Gentlemen:

This will acknowledge receipt of yours of March 20 in which you enclose assignment of claim from Siegel Hardware Company in the amount of $11,800.00 to the Marshall-Wells Company and $13,500.00 to the Bank of Commerce & Savings, Duluth.

This loss has not as yet been adjusted, but when it is we will be very glad to respect your claim.

Yours very truly,
168 A. H. Cheese
Assistant Secretary."

PLAINTIFFS' EXHIBIT O-2.

"Minnesota Implement Mutual
Fire Insurance Company
Owatonna, Minnesota

March 22, 1929

In reply refer to claim No. 14851

Marshall-Wells Company
Dulpth, Minnesota

Re Loss: Siegel Hardware Co.
Duluth, Minnesota

Gentlemen:

This will acknowledge receipt of your letter of March 20 inclosing an order from the Siegel Hardware Company to pay said sums of money to yourselves and to the Bank of Commerce & Savings, Inc., said sums to be deducted from any proceeds that may be due the assured under our policy.

Very truly yours,

Geo. J. Christensen

Geo. J. Christensen

135-251"

Mr. Boyle: The plaintiffs rest.

Mr. Boutelle: The defendants rest.

Mr. Boutelle: The defendants now severally move for a directed verdict, on the ground that the plaintiffs have failed to establish a cause of action.

The basis of these motions is that this action proceeds upon an award had under the compulsory arbitration statute of the state of Minnesota, that the statute is unconstitutional and violative of Sections 4 and 7 of Article I of the State Constitution, and, similarly violative of the Fourteenth Amendment of the Constitution of the United States, as contravening the due process of law, the right or liberty of contract, and the equal protection clause of that amendment.

Mr. Kerr: The plaintiffs move for a directed verdict on the ground that there is no evidence on defendants' part constituting a defense.

The Court: The motion of defendants is denied. The motion of plaintiffs is granted. The record may show that the defendants have an exception to each ruling.

The Court: Ladies and Gentlemen of the Jury: This case

has proceeded to the point where it will be disposed of on the question of law. Under the forms that we have to use in this kind of a situation, the jury returns a verdict under direction of the court. I will appoint Mr. Halenbeck as foreman of the jury and will ask him to step up and sign this as foreman.

Mr. Halenbeck did as instructed by the court, and the following verdict, having been thus signed, and read by the court, was then read by the clerk:

VERDICT.

We, the jury in the above entitled action, find a verdict in favor of the plaintiffs, under the direction of the court, and assess their damages at the sum of seventy-seven thousand and one dollar and forty-six cents ($77,001.46).

Dated at Duluth, Minnesota, this second day of December, A. D. 1929.

HENRY HALENBECK,
Foreman.

CERTIFICATE.

I hereby certify that the foregoing case has been examined by me and found conformable to the truth, and to contain all of the evidence, and, either set forth in full or by appropriate and sufficient reference thereto, all of the exhibits offered and received in evidence on the trial of said action, together with all objections, rulings, orders, and all other proceedings on said trial; and I hereby settle and allow the same as the settled case therein.

Dated January 11th, 1930.

BERT FESLER,
District Judge.

(Title of Cause.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT.

The above entitled action, being regularly upon the calendar of the above named court for the November, A. D. 1929, general term thereof, came on for trial before the court and a jury at the court house in the city of Duluth, Minnesota, on the 2nd day of December, A. D. 1929, the plaintiffs appearing by their attorneys, Kerr, Nelson, Burns & Mollet, of St. Paul, Minnesota, and Fryberger, Fulton & Boyle, of Duluth, Minnesota, and the defendants appearing by their attorneys, Nathan H. Chase and M. H. Boutelle, of Minneapolis, Minnesota:

The court had, prior to the date of said trial, to-wit: On September 9th, 1929, made and filed herein an order as follows, to-wit:

That all issues made by the pleadings in said action be tried to a jury, with the exception of the issue as to the amount of liability of each of the defendants and as to said issue the court will determine the amount of liability, if any, of each defendant, such question being one of computation or mathematics.

At the close of the testimony in said action, the jury, under the direction of the court, returned a verdict in favor of the plaintiffs and against the defendants for the sum of $77,001.46.

The court having heard the evidence adduced at said trial and being fully advised in the premises and upon the verdict of the jury herein and all the files and records in this cause does hereby make and file the following findings of fact and conclusions of law and order for judgment:

FINDINGS OF FACT.

178 As facts the court finds:

1. That at all of the times herein mentioned said plaintiff, The Glidden Company, was and still is a corporation, duly organized, created and existing, and authorized to and actually conducting business in the state of Minnesota.

2. That at all of the times herein mentioned said plaintiff, Marshall Wells Company, was and still is a corporation, duly organized, created and existing, and authorized to and actually conducting business in the state of Minnesota.

3. That at all of the times herein mentioned said plain-
179 tiff, Bank of Commerce and Savings, Inc., of Duluth, Minnesota, was and still is a state banking organization, duly organized, created and existing under and by virtue of the laws of the state of Minnesota, and actually conducting a state banking institution at Duluth, Minnesota.

4. That at all of the times herein mentioned, said plaintiff, Joseph Supornick, was and still is a resident of the city of St. Paul, Minnesota.

5. That at all of the times herein mentioned the defendant, the Retail Hardware Mutual Fire Insurance Company of Minnesota, was and still is a corporation, duly organized,
180 created and existing under and by virtue of the laws of the state of Minnesota, with its principal place of business at Minneapolis, Minnesota, and was and is engaged in the business of insuring property against loss or damage by fire, and was and is duly authorized to and actually transacting said business within the state of Minnesota.

6. That at all of the times herein mentioned the defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, was and still is a corporation, duly organized, created and existing under and by virtue of the laws of the state of Minnesota, with its principal place of business at

Owatonna, Minnesota, and was and is engaged in the business of insuring property against loss or damage by fire, and was and is duly authorized to and actually transacting said business within the state of Minnesota.

7. That at all of the times herein mentioned the defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, was and still is a corporation, duly organized, created and existing under and by virtue of the laws of the state of Wisconsin, with its principal place of business at Stevens Point, Wisconsin, and was and is engaged in the business of insuring property against loss or damage by fire, and was and is duly authorized to and actually transacting said business within the state of Minnesota.

8. That the Siegel Hardware Company is and was at all of the times herein mentioned a corporation, duly organized, created and existing under and by virtue of the laws of the state of Minnesota, with its principal place of business and headquarters at Duluth, Minnesota, and was engaged in a general mercantile business at Duluth, Minnesota, and is hereinafter for brevity referred to as "The Insured."

9. That on or about May 2nd, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from May 2nd, 1928, at noon, to May 2nd, 1929, at noon, in the amount of $2,000.00, upon all property (except notes, bills of exchange, accounts, evidences of and securities of property of every kind, money, currency and bullion) usual and necessary to The Insured's business; its own or held in trust or on commission, or on consignment or sold but not re-

year from June 5th, 1928, at noon, to June 5th, 1929, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. A61[illegible], and was in the standard form prescribed by the laws of the state of Minnesota.

12. That on or about July 5th, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from July 5th, 1928, at noon, to July 5th, 1929, at noon, in the amount of $13,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. A61858, and was in the standard form prescribed by the laws of the state of Minnesota.

13. That on or about November 22nd, 1928, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from November 22nd, 1928, at noon, to November 22nd, 1929, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. A62439, and was in the standard form prescribed by the laws of the state of Minnesota.

14. That on or about February 1st, 1929, said defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consid-

eration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from February 1st, 1929, at noon, to February 1st, 1930, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. A64292, and was in the standard form prescribed by the laws of the state of Minnesota.

15. That on or about August 9th, 1928, said defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from September 1st, 1928, at noon, to September 1st, 1929, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. 22M-5456, and was in the standard form prescribed by the laws of the state of Minnesota.

16. That on or about March 7th, 1929, said defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from March 7th, 1929, at noon, to March 7th, 1930, at noon, in the amount of $10,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. 22M-6318, and was in the standard form prescribed by the laws of the state of Minnesota.

17. That on or about April 3rd, 1928, said defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, duly issued and delivered to The Insured its certain policy of insurance, whereby said defendant, in consideration of the payment of the premium therein specified, which premium has been actually paid to it, insured The Insured against loss or damage by fire for a period of one year from April 3rd, 1928, at noon, to April 3rd, 1929, at noon, in the amount of $9,000.00, upon the same property specifically described in paragraph 9 hereof, which policy was known as No. H22-529, and was in the standard form prescribed by the laws of the state of Minnesota. 194

18. That at all of said times all of the aforesaid policies, by their respective terms, permitted other or concurrent insurance, and at all times each of said policies provided for arbitration and contained a provision in words and figures following, that is to say:

"In case of loss, except in case of total loss on buildings, under this policy, and a failure of the parties to agree as to the amount of the loss, it is mutually agreed that the amount of such loss shall, as above provided, be ascertained by two competent, disinterested and impartial appraisers who shall be residents of this st[illegible] the insured and this company each 195
selecting one within [illegible]een days after a statement of such loss has been rendered to the company, as herein provided, and in case either party fail to select an appraiser within such time the other appraiser and the umpire selected, as herein provided may act as a board of appraisers and whatever award they shall find shall be as binding as though the two appraisers had been chosen; and the two so chosen shall first select a competent, disinterested and impartial umpire; provided, that if after [illegible] days the two appraisers cannot agree on such an umpire, the presiding judge of the District

[illegible] appraisal [illegible] the loss, [illegible] each appraiser [illegible] application of either party in writing [illegible] days' notice thereof in writing to the other [illegible] Failure within fifteen days after a statement of such [illegible] has been rendered to the company, either party, the assured or the company, shall have notified the other in writing that such party demands an appraisal, such right to an appraisal shall be waived; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of the loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the expenses for the appraisal and umpire. The fees of any appraiser or umpire shall in no case exceed ten dollars ($10.00) per day."

19. That each of said policies provided for co-insurance and contained a co-insurance clause and provision in words and figures following, that is to say:

"In consideration of the acceptance by the insured of a reduction of the cash fixed rate of $..... to $....., it is expressly stipulated and made a condition of this contract that the insured shall maintain contributing insurance during the life of this policy upon the property hereby insured to the extent of at least 80% of the actual cash value at the time of the loss, and that failing so to do, the insured shall to the extent of such deficiency bear his, her or their proportion of any loss, and it is expressly stipulated that in [illegible] division in the form of this policy this clause shall apply to each and every item."

[illegible] at all times [illegible] during the life of [illegible] insured, to

time of the loss.

20. That all of the property insured [illegible] respective policies hereinbefore mentioned, [illegible] times herein mentioned, and [illegible] said policies, and each of them, were [illegible] be at all times down to and including the [illegible] set forth, the property of and owned by The Insured.

21. That in and by each of the policies hereinbefore mentioned, it was provided that if there should be any other insurance on the property insured, whether prior or subsequent, The Insured should recover on said respective policies no greater proportion of loss, whether by fire, lightning, or both, except in case of total loss on buildings, [illegible] than the sum in such respective policies, and so insured, bears to the whole amount insured thereon.

22. That on March 9th, 1929, and while said policies, and each of them, were in full force, a fire occurred on said premises by reason of which the property in said respective policies described was damaged, and certain thereof totally destroyed.

23. That immediately after said fire said defendants, and each of them, were given notice thereof, and notice of the consequent loss thereunder, and thereupon The Insured, on March 16th, 1929, rendered to said defendants, and each of them, sworn statements in writing and proofs of loss, signed and sworn to by The Insured, setting forth all the facts relating to said policies, and each of them, and in accordance therewith, and in accordance with the laws of the state of Minnesota then in force.

24. That The Insured, at the time of said fire, had an insurance upon said property so damaged and destroyed, [illegible] as is hereinbefore set forth.

25. That The Insured and said defendants have failed to agree as to the amount of loss and damage sustained by virtue of said fire.

26. That by reason of the disagreement between the defendants and The Insured as to the amount of loss and damage and in accordance with the arbitration clause contained in each of said defendants' policies, as aforesaid, and in accordance with the laws of the state of Minnesota in such case made and provided, The Insured on March 26th, 1929, served upon said defendants, and each of them, a written demand for arbitration, and in said demand selected W. C. Rodgers as its appraiser.

That said W. C. Rodgers is and was at all of the times herein mentioned a resident of St. Paul, Minnesota, and is and was a competent, disinterested and impartial appraiser.

That said defendants, and each of them, failed, neglected and refused to appoint or select an appraiser in said arbitration proceedings to represent their respective interests, or otherwise, within fifteen days after a statement of The Insured's loss had been rendered to the respective companies, or otherwise, or at all.

That thereupon, and on failure of said defendants, and each of them, to appoint or select an appraiser as aforesaid, The Insured, on April 4th, 1929, petitioned the Honorable The District Court of the Eleventh Judicial District, state of Minnesota, wherein said property was situated, for an order appointing and designating an umpire for the purpose of and to complete a board of appraisers in conformity with the provisions of said insurance policies and the laws of the state of Minnesota in such case made and provided, and thereupon and on said date last mentioned, The Insured caused to be served upon each of said defendants the said

petition, and a motion based thereon, for an order appointing an umpire to complete the board of appraisers in said matter, which motion was by its terms made returnable before the above named court, at the court house, in the city of Duluth, county of St. Louis, state of Minnesota, on Saturday, the 13th day of April, 1929, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel could be heard, and which motion was by its terms based upon said petition and affidavit which was thereto attached, and was made for the reason and upon the ground that, within the time fixed thereby by law and the provisions of said insurance policies, the defendants, and each of them, had not named an appraiser so that the two appraisers could agree upon an umpire to serve upon said board of appraisers.

That thereupon and on said April 13th, 1929, at 9:30 o'clock A. M., at the court house, in the city of Duluth, St. Louis county, Minnesota, said motion was duly submitted to and argued before the undersigned presiding judge of said court, and said judge, on said date, duly made and entered his order appointing Thomas M. McCabe, of the city of Duluth, Minnesota, as umpire to make up said board of appraisers in said matter.

That all of the papers relative to the appointment of an umpire were duly filed with the clerk of the above named court and became and are a record of said court.

That thereupon and on April 16th, 1929, written notice of such appointment of an umpire was duly served upon said defendants, and each of them, at which time said defendants, and each of them, were notified in writing that the said umpire had designated April 19th, 1929, at 10:00 A. M., as the time, and the umpire's office in the Torrey Building, in the city of Duluth, Minnesota, as the place for a meeting of the board of appraisers to hear evidence and consider and

determine the matter of loss and damage, and to make their award thereon, all in pursuance to their duties as such board of appraisers.

27. That thereupon, and after his appointment, and prior to said arbitration, said umpire duly qualified as such and accepted his said appointment and, together with said Rodgers, swore in writing that he and they would act in strict impartiality in all matters of difference that should be submitted to them in connection with the appraisement, and that they would justly perform the duties and trust of umpire and appraiser, respectively, and would make true, just and conscientious award, according to the best of their ability.

28. That thereupon and at the time and place so designated, and on April 19th and 20th, 1929, the said appraiser and said umpire, after examining the burned premises and the remains of the property damaged and destroyed and after hearing evidence, estimated and appraised the loss occasioned by said fire, and, thereupon and on said April 20th, 1929, said appraiser Rodgers and said umpire McCabe made an award in writing, by the terms of which, and whereby they found and stated separately that the sound value of the stock of merchandise so damaged and destroyed immediately preceding said fire was $67,600.76, and that the loss and damage thereto occasioned by said fire was $61,600.76, and by the terms of which and whereby they further found and stated separately that the sound value of the entire furniture and fixtures so damaged and destroyed immediately preceding said fire was $14,000.00, and that the loss and damage thereto occasioned by said fire was $13,364.15, thus making a total loss and damage occasioned by said fire of $74,964.91.

That thereupon and on April 22nd, 1929, written notice of such award, together with a certified copy of said ap-

praisal and award, was duly sent to [illegible] defendants, and each of them.

29. That said defendants, and each of them, by their respective duly authorized adjusters, immediately after said fire went to Duluth, Minnesota, proceeded to and did conduct a full and complete investigation of said fire and said loss, but notwithstanding the same, said defendants, and each of them, although being duly notified of all the steps incident to said arbitration and award, failed, neglected and refused to in any way participate therein.

30. That due demand for the payment of said award and their respective proportions thereof, was made upon the defendants and each of said defendants, more than sixty days before commencement of this action, but said defendants and each of them, did fail, neglect and refuse to pay the same or any part thereof.

31. That The Insured, prior to the commencement of this action, for a good and valuable consideration, assigned, transferred and set over to the plaintiffs all its right, title and interest in and to its said fire loss hereinbefore referred to, and in and to its chose in action against said defendants and each of them, by reason thereof, and said plaintiffs, thereupon, became and, at the commencement of this action were and now are the owners and holders of said loss and chose in action, and entitled to sue thereon.

32. That The Insured and the plaintiffs have performed all of the conditions and done all of the acts required to be done by them or either of them, by virtue of said policies and each of them.

33. That the amount of the liability of each defendant for such loss and award depends upon the liability of the other defendants and to adjudge the respective liabilities of the defendants it is necessary at the same time to determine

the liability of each, and all of the defendants having denied liability, it was proper for the plaintiffs to join all of the defendants in this action.

That, by reason of the facts aforesaid, there is now due and owing to the plaintiffs from the defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, the sum of $49,088.48.

That, by reason of the facts aforesaid, there is now due and owing to the plaintiffs from the defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, the sum of $19,250.32.

That, by reason of the facts aforesaid, there is now due and owing to the plaintiffs from the defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, the sum of $8,662.66.

CONCLUSIONS OF LAW.

As conclusions of law, the court finds:

1. That the plaintiffs are entitled to judgment against the defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, in the sum of $49,088.48.

2. That the plaintiffs are entitled to judgment against the defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, in the sum of $19,250.32.

3. That the plaintiffs are entitled to judgment against the defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, in the sum of $8,662.66.

4. That the plaintiffs are entitled to judgment against the defendants for the costs and disbursements of this action, to be taxed and allowed in accordance with the laws of the State of Minnesota.

Let judgment be entered accordingly, after a stay of ten days from the filing of these findings.

December 5, 1929.

By the Court,

BERT FESLER,

Judge.

(Title of Cause.)

NOTICE OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

To the above named plaintiffs, The Glidden Company, a corporation; Marshall Wells Company, a corporation; Bank of Commerce and Savings, Inc., of Duluth, Minnesota, a Minnesota state banking corporation, and Joseph Supornick; and to Messrs. Kerr, Nelson, Burns & Mohan, and Messrs. Fryberger, Fulton & Boyle, their attorneys:

Take notice, that the above named defendants, and each thereof, will severally move the above named court at a special term thereof to be held in the court house in the city of Duluth, Minnesota, on Saturday, January 18th, 1930, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, for judgment in favor of each of said defendants, notwithstanding the verdict heretofore rendered herein, upon the following grounds:

1. That the verdict is not justified by the evidence.

2. That the verdict is contrary to law.

3. That the trial court erred in denying the motions of defendants, severally, for a directed verdict.

4. That the trial court erred in granting plaintiffs' motion for a directed verdict.

Said motion will be based upon the settled case herein and

all of the files, records and proceedings herein.

Dated January 9th, 1930.

NATHAN H. CHASE and
M. H. BOUTELLE,
Attorneys for Defendants.

(Title of Cause.)

ORDER.

The above entitled matter came duly on for hearing before the undersigned, one of the judges of the above named court, at a special term thereof, held on Saturday, January 18th, 1930, upon the motion of each of the above named defendants for judgment notwithstanding the verdict heretofore entered in said action; Messrs. Nathan H. Chase and M. H. Boutelle appearing for defendants in support of said motion, and Messrs. Fryberger, Fulton & Boyle appearing for plaintiffs in opposition thereto.

Having given said motion due consideration,

It is hereby ordered, that said motion be, and the same hereby is, denied, as to each and all of said defendants.

Dated January 18th, 1930.

By the Court,
BERT FESLER,
District Judge.

(Title of Cause.)

NOTICE OF TAXATION OF COSTS AND BILL OF COSTS AND DISBURSEMENTS.

Amount allowed in findings against the defendant,
The Retail Hardware Mutual Fire Insurance
Company of Minnesota $10,085.48
Interest on same, from December 5th, 1929 at
6% 400.90

Amount allowed in findings against the defendant, Implement Mutual Fire Insurance Company of Minnesota	[illegible]
Interest on same from December 5th, 1929 at 6%	157.2[illegible]
Amount allowed in findings against the defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin	8,062.[illegible]
Interest on same from December 5th, 1929 at 6%	70.75
	$77,630.[illegible]

Plaintiffs' Costs and Disbursements.

Clerk's fees, to be taxed	4.00
Statutory Costs	10.00
Seven (7) Affidavits	1.75
Sheriff's fees	2.00
Commissioner of Insurance fees	4.00

Witness fees, viz.,

Names Residence	No. days Attendance	Dates of Attendance	No. Miles Traveled	
Thomas M. McCabe, Duluth,	1	Dec. 2, 1929,	2	1.1[illegible]
John Siegel, Duluth,	1	Dec. 2, 1929,	2	1.2[illegible]
Joseph Siegel, Duluth	1	Dec. 2, 1929,	2	1.2[illegible]
J. E. Markle, Duluth,	1	Dec. 2, 1929,	2	1.1[illegible]
H. A. Sedgwick, Duluth,	1	Dec. 2, 1929,	2	1.1[illegible]
J. N. Lindeke, Duluth,	1	Dec. 2, 1929,	4	1.[illegible]

Albin Letour, Colbeyville,	1	Dec. 2, 1929,	15	1.90
Fred Lindbeck, Saginaw,	2	Dec. 2, 3, 1929,	50	5.00

The above Bill of Costs and Disbursements taxed and allowed at.....$ 36.09

Total Amount.....$77,666.41

Dated January 24th, 1930.

J. P. JOHNSON,
Clerk of District Court.

NOTICE OF TAXATION OF COSTS.

Please take notice, that on the 24th day of January, A. D. 1930, at 10:00 o'clock A. M., application will be made to J. P. Johnson, Esq., clerk of the above named court, at his office in the court house, in the city of Duluth, in the county of St. Louis and state of Minnesota, to have the foregoing bill of costs and disbursements taxed and inserted in the judgment then and thereto be entered therein.

Dated January 18th, 1930.

Yours respectfully,
KERR, NELSON, BURNS & MOHAN,
FRYBERGER, FULTON & BOYLE,
Attorneys for Plaintiffs.

To the above named defendants, and to Messrs. Nathan H. Chase and M. H. Boutelle, attorneys for defendants.

(Title of Cause.)

JUDGMENT.

The above entitled action, being regularly upon the calendar of the above named court for the November, A. D. 1929, general term thereof, came duly on for trial before the court and a jury at the court house in the city of Duluth, Minnesota, on the 2nd day of December, A. D. 1929, the plaintiffs appearing by their attorneys, Kerr, Nelson, Burns & Mohan, of St. Paul, Minnesota, and Fryberger, Fulton & Boyle, of Duluth, Minnesota, and the defendants appearing by their attorneys, Nathan H. Chase and M. H. Boutelle, of Minneapolis, Minnesota.

The court had, prior to the date of said trial, to-wit: On September 9th, 1929, made and filed herein an order as follows, to-wit:

"That all issues made by the pleadings in said action be tried to a jury, with the exception of the issue as to the amount of liability of each of the defendants and as to such issue the court will determine the amount of liability, if any, of each defendant, such question being one of computation or mathematics."

At the close of the testimony in said action, the jury, under the direction of the court, returned a verdict in favor of the plaintiffs and against the defendants for the sum of $77,001.46.

The court having heard the evidence adduced at said trial and being fully advised in the premises and upon the verdict of the jury and all of the files and records herein, did, thereafter, to-wit: On December 5th, A. D. 1929, make and file herein findings of fact, conclusions of law and order for judgment. Now, therefore, pursuant to said findings of fact, conclusions of law and order for judgment, and on motion

of the attorneys for the plaintiffs, it is adjudged and de-
232 creed:

1. That the plaintiffs recover of and from the defendant, The Retail Hardware Mutual Fire Insurance Company of Minnesota, the sum of $49,512.38.

2. That the plaintiffs recover of and from the defendant, Minnesota Implement Mutual Fire Insurance Company of Minnesota, the sum of $19,416.56.

3. That the plaintiffs recover of and from the defendant, The Hardware Dealers Mutual Fire Insurance Company of
233 Wisconsin, the sum of $8,737.47.

Witness the Hon. Bert Fesler, judge of the District Court, aforesaid, at Duluth, Minnesota, this 24th day of January, A. D. 1930.

J. P. JOHNSON,
Clerk of District Court.
By B. G. RILLING,
Deputy Clerk.

(Filed and docketed on January 24th, 1930.)

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234 (Title of Cause.)

NOTICE OF APPEAL TO SUPREME COURT.

To Messrs. Kerr, Nelson, Burns & Mohan; Messrs. Fryberger, Fulton & Boyle, and to J. P. Johnson, Esq., clerk of said District Court:

Please take notice, that the above named defendant, Hardware Dealers Mutual Fire Insurance Company of Wisconsin, appeals to the Supreme Court of the state of Minnesota, from the judgment of the said District Court entered herein, on the 24th day of January, A. D. 1930, and from the whole thereof.

Dated this 24th day of January, 1930.

NATHAN H. CHASE and
M. H. BOUTELLE,
Attorneys for Defendant
Hardware Dealers Mutual Fire
Insurance Company of Wisconsin.

Due service of the within notice of appeal is hereby admitted this 24th day of January, 1930.

KERR, NELSON, BURNS & MOHAN,
FRYBERGER, FULTON & BOYLE,
Attorneys for Plaintiffs.
J. P. JOHNSON,
Clerk of District Court.

(Similar notice served by each of the other two defendants.)

(Title of Cause.)

UNDERTAKING ON APPEAL.

Whereas, Hardware Dealers Mutual Fire Insurance Company of Wisconsin, one of the defendants in the above entitled action, appeals to the Supreme Court of Minnesota, from the judgment made and entered therein on January 24th, 1930;

Now, therefore, American Surety Company of New York does undertake, promise and agree to and with each and all of the above named plaintiffs, respondents on said appeal, that said Hardware Dealers Mutual Fire Insurance Company of Wisconsin, appellant, shall pay the amount directed to be paid by said judgment, or the part thereof as to which it is affirmed, if it is affirmed only in part, and all damages awarded against appellant upon said appeal.

Conditioned, however, that the liability of said American

Surety Company of New York shall not exceed the sum of
238 $10,600.00.

Dated January 25th, 1930.

AMERICAN SURETY COMPANY OF NEW YORK,
By J. G. LEWIS,
Resident Vice-President.

Attest:
R. O. PETERSON,
Resident Asst. Sec. at Minneapolis.

(Seal)

Witnessed by:
H. S. LINDAHL,
239 O. SOLBERG.

State of Minnesota,
ss.
County of Hennepin.

On this 25th day of January, A. D. 1930, before me personally appeared J. G. Lewis and R. O. Peterson, to me personally known, who, being by me each duly sworn, did say on oath: That they are the resident vice-president and the resident assistant secretary, respectively, of the American Surety Company of New York, the corporation described in
240 and which executed the foregoing instrument; that the seal affixed to said instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said J. G. Lewis and said R. O. Peterson, each acknowledged the said instrument to be the free act and deed of said corporation.

G. M. KLABO,
Notary Public,
Hennepin County, Minn.

(Seal)

My commission expires April 24, 1931.

Bond and surety approved this 27th day of January, 1930.

E. J. KENNY,
District Judge.

(Similar undertaking given for $59,900.00 by defendant The Retail Hardware Mutual Fire Ins. Co. of Minnesota, and for $23,500.00 by defendant Minnesota Implement Mutual Fire Ins. Co. of Minnesota.)

Nos. 27939, 27940, 27941.

SUPREME COURT OF MINNESOTA.

1930.

THE GLIDDEN COMPANY, a Corporation; MARSHALL WELLS COMPANY, a Corporation; BANK OF COMMERCE AND SAVINGS, INC., OF DULUTH, MINNESOTA, a Minnesota State Banking Corporation, and JOSEPH SUPORNICK, Plaintiffs,

vs.

THE RETAIL HARDWARE MUTUAL FIRE INSURANCE COMPANY OF MINNESOTA, MINNESOTA IMPLEMENT MUTUAL FIRE INSURANCE COMPANY OF MINNESOTA, and THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN, All Corporations, Defendants.

STIPULATION.

Whereas, in the above entitled action, separate answers were made and interposed by each of the above named defendants and separate replies were made to such separate answers; and

Whereas, as shown by the record herein, separate judg-

ments were entered against each of said defendants, and separate appeals and undertakings on appeal were taken and given by each of said defendants from the judgment so rendered against each, respectively, and

Whereas, the issues involved in the above entitled action are in all respects identical as to each of said defendants,

Now, therefore, for the purpose of avoiding unnecessary expense in the preparation of the record on appeal herein, including any appeal that may be taken herein by either party hereto to the Supreme Court of the United States, from the decision and judgment of the Supreme Court of Minnesota,

It is hereby stipulated and agreed by and between the respective parties to the above entitled action that the above named defendant, The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, shall actively prosecute the appeal so taken by it as aforesaid; and that the printed record on appeal herein—and upon any subsequent appeal to the Supreme Court of the United States—shall and may contain only such pleadings (including entry of judgment, notice of appeal, undertaking, etc.) as concerns said last above named defendant; and that the other two defendants, viz., Retail Hardware Mutual Fire Insurance Company of Minneapolis, and Minnesota Implement Mutual Fire Insurance Company of Minnesota, and each thereof, shall and will in all things abide the final determination and result of said appeal of said The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, including any appeal that may be taken by any of the parties hereto to said Supreme Court of the United States.

If the defendants, or any of them, appeal from the judgment of the Minnesota Supreme Court, they or it shall furnish a supersedeas bond or undertaking on appeal with the

American Surety Company of [illegible]
amount adequate to cover liability of [illegible]

Dated February 6, 1930.

KERR, MELROY, [illegible]
FRYBERGER, FULTON & BOUTELLE,
Attorneys for [illegible]

NATHAN H. CHASE and
M. H. BOUTELLE,
Attorneys for [illegible]

The undersigned, American Surety Company of New York, who is the surety upon three certain undertakings on appeal all dated January 25, 1930, and covering separate appeals by each of the defendants in the above entitled action, hereby joins in, consents to and agrees to be bound by the above stipulation.

AMERICAN SURETY COMPANY OF NEW YORK.

By J. G. LEWIS,
Resident Vice-President.

Attest:

(Corporate Seal) R. O. PETERSON,
Resident Asst. Secretary at Minneapolis,
Minnesota.

Witnesses:

B. BOLAND,
H. S. LINDAHL.

[File endorsement omitted]

IN SUPREME COURT OF MINNESOTA

THE GLIDDEN COMPANY et al., Respondents,

vs.

THE RETAIL HARDWARE MUTUAL FIRE INSURANCE CO. OF MINNESOTA et al., Appellants

No. 196. 27939-40-41

St. Louis County, Dibell, J.

Syllabus.

1. The business of fire insurance is affected with a public interest and is subject to control and regulation by the state.

2. The provision in the Minnesota standard policy for arbitration or appraisal in case of disagreement as to loss is not violative of Art. 1, §§ 4 and 7 of the state constitution or of the Fourteenth Amendment of the Federal Constitution.

3. Though the arbitration is conducted somewhat after the fashion of a common law arbitration as distinguished from our statutory arbitration the standard policy arbitration or appraisal is not revocable but is a method fixed by statute for finding loss in the event of disagreement and is binding upon insurer and insured.

Judgment affirmed.

OPINION—Filed Nov. 28, 1930

DIBELL, J.:

Action on an award or appraisal made pursuant to policies of fire insurance issued by the defendant insurance companies. A verdict for something over $77,000 was directed for the plaintiffs by the court. It was apportioned by the court's findings, $29,088.48 against the defendant Retail

Hardware Mutual Fire Insurance Company of Minnesota; $19,250.32 against the defendant Minnesota Implement Mutual Fire Insurance Company; and $8,662.66 against the defendant Hardware Dealers Mutual Fire Insurance Company of Wisconsin. The defendants appeal and present for review the judgment in the latter amount, agreeing to abide the result in the others.

The defendants claim that the compulsory appraisal provision of our standard policy, applicable in the event of the parties disagreeing as to the amount of the loss, G. S. 1923, § 3512, is violative of art. 1, §§ 4 and 7 of the state constitution, and of the Fourteenth Amendment.

It is conceded substantially that the recent case of Itasca Paper Company v. Niagara Fire Ins. Co. 175 Minn. 73, 220 N. W. 425, if applied controls. The defendants urge that certain late federal cases have changed the doctrine there approved. They ask a reconsideration of the questions involved with the purpose, if unsuccessful here, of having a review in the court of final authority. After a thorough reconsideration we follow the Itasca case. An extended further discussion is not necessary.

1. The business of fire insurance is affected with a public interest. Northwestern National Life Ins. Co. v. Riggs, 203 U. S. 243; German Alliance Ins. Co. v. Lewis, 233 U. S. 389; National Fire Ins. Co. v. Wanberg, 260 U. S. 71; Abramowitz v. Continental Ins. Co. 170 Minn. 215, 212 N. W. 449; Itasca Paper Co. v. Niagara Fire Ins. Co. 175 Minn. 73, 220 N. W. 425, and cases cited. Within reasonable limits the state may regulate the insurance business, and prescribe the conditions under which policies may be written and insurance business done. Its control must be reasonable.

In Hamilton v. Liverpool, etc. Ins. Co. 136 U. S. 242, which involved a Kentucky policy, the parties in their desire for arbitration stood in a position directly opposed to that of the parties here. The insurance company wanted arbitration. The insured refused to participate and brought an action on the policy. A verdict was directed for the insurance company. In directing the verdict the theory of the trial court was that the defendant insurance company had the right to an arbitration of the amount of the

loss. The report states "that the court, after the case had been argued, instructed the jury that it appeared from the evidence that the defendant requested the plaintiff in writing to submit the amount of his loss or damage under the policy to competent and impartial persons, and the plaintiff refused so to do, and instructed the jury to return a verdict for the defendant, which was accordingly rendered". The plaintiff brought error and the Supreme Court disposed of the question in this language:

"The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; * * * The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action.

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country."

This case seems sufficient authority. The defendants cite the following cases claiming that they change the rule: Terral v. Burke Construction Co. 257 U. S. 529 (statute invalid providing for revocation of license of foreign corportation because while doing domestic business in state it resorted to federal court); Coppage v. Kansas, 236 U. S. 1 (statute invalid making it a misdemeanor for employer to require employe to agree not to become or remain member of labor organization during his employment); Frost v. Railroad Commission, 271 U. S. 583 (statute invalid requiring user of highway by private carrier for hire to assume burdens and duties of common carrier); Hanover

Fire Ins. Co. v. Harding, 272 U. S. 494 (statute invalid requiring foreign corporation to submit to various conditions or waive constitutional rights—contract); Tyson v. United Theatre, etc. 273 U. S. 418 (statute invalid regulating sale of theatre tickets). We find in none of them a suggestion that the rule of Hamilton v. Liverpool, etc. Ins. Co. 136 U. S. 242, is not the correct one. In the Terral case it is noted that the decisions are not all in harmony and that that case necessarily overrules Doyle v. Continental Ins. Co. 94 U. S. 535, and Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246. But we see no substantial reason for holding that the basis of the rule of the Hamilton case is affected.

2. The claim is then made that the arbitration provision if compulsory ousts the jurisdiction of the court and therefore is invalid. This is not the view we take. Liability is not fixed by means of an appraisal. There is only a finding of the loss. See Abramowitz v. Continental Ins. Co. 170 Minn. 215, 212 N. W. 449, and cases cited. Liability is left for judicial determination. The right of appraisal is as well for the insured as insurer, it does not determine liability but only the amount of the loss, and the statute is constitutional. An award may be so grossly excessive or inadequate as to be subject to vacation as for fraud though there be no actual fraud, and it may be vacated for actual fraud, for in either of such cases there is a judicial determination of liability. Herrington v. Agr. Ins. Co. 179 Minn. 510, 229 N. W. 792.

We quote again from Hamilton v. Liverpool, etc. Ins. Co. 136 U. S. 242, referring to a provision for arbitration:

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country."

The whole law is tersely stated at sufficient length, with a citation of the controlling authorities, in Vance on Insurance (2 ed.) 764:

"It is well settled that a clause intended to refer to arbitration the whole question of the insurer's liability under the contract is void, as ousting the jurisdiction of the court. If the matter referred is merely the amount of that liability, the condition is perfectly valid and will be enforced."

And we note in Red Cross Line Co. v. Atlantic Fruit Co. 264 U. S. 109, a reference to the validity of a general executory agreement for arbitration "where the agreement, leaving the general question of liability to judicial decision, confines the arbitration to determining the amount payable, or to furnish essential evidence of specific facts, and makes it a condition precedent to the cause of action."

And see Orient Ins. Co. v. Skellett Co. 28 F. (2d) 968; Continental Ins. Co. v. Titcomb, 7 F. (2d) 833; Hamberg v. St. Paul, etc, Ins. Co. 68 Minn. 335, 71 N. W. 388; Mosness v. German-American Ins. Co. 50 Minn. 341, 52 N. W. 932; Gasser v. Sun Fire Office, 42 Minn. 315, 47 L. R. A. (N. S.) 337.

3. We have referred often to the policy arbitration or appraisal as in the nature of a common law arbitration. It is so in contradistinction from our statutory arbitration. The companies claim that an agreement for a common law arbitration is revocable, and therefore the policy provision is revocable, and they claim that by refusing to participate they revoked. This does not follow. It was never the intent of the statute that the arbitration was other than compulsory. If revocable there would be no actual or effective appraisal within the contemplation of the policy. It was the thought of the legislature that dealing with business affected with a public interest it would provide for the ascertainment of loss, not liability, by a so-called arbitration for which it prescribed, and that the policy upon this point was not an executory agreement. It did not provide something that either party through whim or caprice might disregard. And what it made was a definite procedure binding upon both parties in ascertaining loss.

Judgment affirmed.

IN SUPREME COURT OF MINNESOTA

27939-40-41

THE GLIDDEN COMPANY, a Corporation, et al., Respondents,

vs.

THE RETAIL HARDWARE MUTUAL FIRE INSURANCE COMPANY OF MINNESOTA, et al., Appellants

JUDGMENT—Filed Dec. 9, 1930

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the Judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of St. Louis, be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondents herein, do have and recover of appellants, herein the sum and amount of thirty-five and 25/100 dollars ($35.25), costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed Dec. 9th, 1930, A. D. 193-.

By the Court.

Attest:

Grace Kaercher Davis, Clerk. (Seal of the Supreme Court, State of Minnesota.)

Statement for Judgment

Statutory Costs, $25.00; Printer, $10.00; Clerk, $—; Acknowledgments, $.25; Return, $—; Postage and express, $—; Filing Mandate, $—; Transcript, $—; Appeal Bond, $—; Total, $35.25.

Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

IN SUPREME COURT OF MINNESOTA

No. 27941

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA TO THE SUPREME COURT OF THE UNITED STATES

To the Chief Justice of the Supreme Court of the State of Minnesota:

The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, a corporation of Wisconsin, respectfully shows:

1. Petitioner is the appellant in the above entitled cause;

2. The appeal in said cause was from a judgment for the recovery of money rendered in a civil action on the 24th day of January, A. D., 1930, by the District Court of the County of St. Louis, Eleventh Judicial District of the State of Minnesota against petitioner and in favor of the above named respondents;

3. That on appeal from such judgment by petitioner to the said Supreme Court of the State of Minnesota, such court being the highest court of law and equity in said state in which a decision of the matters in controversy could be had, the judgment appealed from was in all respects affirmed by the final judgment entered in the said Supreme Court on the — day of December, A. D. 1930;

4. That there is error in the final judgment and the record of proceedings in this cause in the said Supreme Court of the State of Minnesota, whereby petitioner is aggrieved in that in the decision and judgment of said Court, there was drawn in question the validity of a statute of the State of Minnesota, namely, Chapter 410 of the General Laws of Minnesota of 1913, on the ground of its being repugnant to and in contravention of the Fourteenth Amendment of the Constitution of the United States and that the

decision and judgment of said Court was in favor of the validity of such statute;

5. That contemporaneously with the aforesaid appeal of petitioner, appeals to the said Supreme Court of the State of Minnesota were regularly perfected by respectively The Retail Mutual Fire Insurance Company of Minnesota and Minnesota Implement Mutual Fire Insurance Company of Minnesota, from separate judgments rendered by the aforesaid District Court of St. Louis County, Minnesota, in favor of the above named respondents and against said last named appellants in the same cause as that in which judgment was rendered against petitioner; that it was stipulated of record between all of the parties to the cause last aforesaid and the several judgments therein rendered, that the appeals in the Supreme Court of the State of Minnesota should be heard and determined in the case of petitioner and that the final judgments on the other appeals hereinabove indicated should abide the event; that it was further provided by such stipulation that if an appeal were taken from the final judgment rendered on such appeals by the Supreme Court of the State of Minnesota to the Supreme Court of the United States, such appeal might be had or taken by either of said several appellants and from either of the judgments so rendered by the Supreme Court of the State of Minnesota and that the judgments rendered against the others of said appellants should similarly abide the event of the appeal to the Supreme Court of the United States on condition that the appellant in such appeal to the Supreme Court of the United States should furnish a supersedeas bond or undertaking in an amount adequate to cover the liability of each of said several appellants as ascertained and adjudicated by the Supreme Court of the State of Minnesota;

Wherefore Petitioner prays for the allowance of an appeal from the aforesaid final judgment of the Supreme Court of the State of Minnesota against petitioner to the Supreme Court of the United States in order that the decision and judgment of the Supreme Court of the State of Minnesota may be examined and reversed and further prays that a transcript of the record, proceedings and papers in

this cause, duly authenticated by the clerk of the Supreme Court of the State of Minnesota, may be sent to the Supreme Court of the United States, as provided by law.

Petitioner further prays that the appeal herein may be a supersedeas; that the Court may, by appropriate order, fix the security required in accordance with the foregoing stipulation; that on approval of such security, such appeal may be allowed as a supersedeas with respect to all said several judgments and that the court reserve jurisdiction with respect to all such judgments to revise the same in accordance with the judgment and mandate of the Supreme Court of the United States in the appeal hereby prayed.

The errors upon which petitioner claims to be entitled to an appeal are those hereinabove indicated and which are more fully set out in the Assignments of Errors filed herewith.

Dated December 17, 1930.

Nathan H. Chase and Mortimer H. Boutelle, Attorneys for Petitioner-Appellant, Minneapolis, Minnesota.

IN SUPREME COURT OF MINNESOTA

No. 27941

[Title omitted]

ORDER ALLOWING APPEAL—Filed Dec. 24, 1930.

The Petition of The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, appellant in the above entitled matter, for an appeal therein to the Supreme Court of the United States from the Supreme Court of the State of Minnesota and the Assignment of Errors filed therewith and the record of said cause having been considered:

It is ordered: That an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Minnesota as prayed in said petition and that the Clerk of the Supreme Court of the State of Minnesota shall prepare and certify a transcript of the record and proceedings in the above entitled cause and trans-

mit the same to the Supreme Court of the United States within thirty (30) days from the date hereof.

It is further ordered: That

Whereas, the parties to the above entitled cause and those to the certain other appeals in the Supreme Court of the State of Minnesota, indicated in the Petition for appeal herein, have stipulated that the appeal may be taken in this cause and that the same shall operate as a supersedeas with respect to the judgment herein appealed from as well as such other judgments, conditioned that a bond or undertaking be filed herein, in an amount sufficient to cover all said judgments, including damages and costs as provided by law; that appellant shall file its bond or undertaking in the sum of Ninety Thousand (90,000) Dollars conditioned that it shall prosecute said appeal to effect and if appellant shall fail to make its plea good to answer all damages and costs and further conditioned to pay any amounts ultimately adjudicated by the Supreme Court of the State of Minnesota against such other appellants in the aforesaid petition for appeal mentioned.

The said appellant now presenting an undertaking in the sum of Ninety Thousand (90,000) Dollars, executed by American Surety Company of New York, it is ordered that such undertaking be and the same is hereby approved.

It is further ordered the appeal herein shall operate as a supersedeas.

Dated December 18th, 1930.

S. B. Wilson, Chief Justice of the Supreme Court of the State of Minnesota.

[File endorsement omitted.]

Bond on appeal for $90,000, approved and filed December 24, 1930, omitted in printing.

Citation, in usual form, showing service on Kerr, Nelson, Burns & Mohan et al., filed December 24, 1930, omitted in printing.

IN SUPREME COURT OF MINNESOTA

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed Dec. 24, 1930

It is hereby stipulated and agreed that the record to be certified to the Supreme Court of the United States from the Supreme Court of the State of Minnesota, on the appeal in the above entitled cause, shall contain the following:

1. Printed record in Supreme Court of Minnesota on appeal from the District Court of St. Louis County.
2. Opinion of the Supreme Court of Minnesota.
3. Judgment of the Supreme Court of Minnesota.
4. Petition for appeal and assignment of errors.
5. Order allowing appeal.
6. Copy of undertaking on appeal.
7. Citation.

Serving of præcipe hereby waived.

Kerr, Nelson, Burns & Mohan and Fryberger, Fulton & Boyle, Attorneys for Respondents. Nathan H. Chase and M. H. Boutelle, Attorneys for Appellant.

Dated December 18th, 1930.

Clerk's certificates omitted in printing.

SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED ON AND STIPULATION TO PRINT ENTIRE RECORD—Filed Feb. 16, 1931

The single point intended to be urged and relied on by appellant on the appeal in the above entitled cause is the constitutionality of so much and that part of the General Laws of the State of Minnesota, 1913, ch. 421 (Mason's Minnesota Statutes 1927, sec. 3512) as prescribes compulsory arbitration or appraisal of the amount of loss and damage sustained by the subject-matter of insurance covered or insured against loss or damage by fire under the required Standard Form of fire insurance policy prescribed by the laws of that State.

The present appeal is taken from a final judgment rendered by the Supreme Court of the State of Minnesota, the highest court in that state in which a decision could be had, against appellant. The single question raised on such appeal was the constitutionality of the above mentioned statute. Such statute was challenged on said appeal as repugnant to the Constitution of the United States and more particularly to the Fourteenth Amendment, as denying (1) due process of law, (2) the equal protection of the law, and (3) the liberty of contract.

The Supreme Court of the State of Minnesota by its decision and judgment, held that the statute in question was valid and not in contravention of the Federal Constitution.

The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, Appellant. Nathan H. Chase, Mortimer H. Boutelle, Counsel for Appellant, Minneapolis, Minnesota.

STIPULATION FOR PRINTING RECORD

It is stipulated between the parties to the above entitled cause, that the record to be printed by the Clerk of the Supreme Court of the United States in said cause, shall comprise and include the entire record as transmitted to the above entitled Court from the Supreme Court of the State of Minnesota.

Dated February 11, 1931.

Nathan H. Chase, Mortimer H. Boutelle, Counsel for Appellant. Kerr, Nelson, O'Neill, Mahon & Dudley, Fryberger, Fulton & Boyle, Counsel for Appellees.

[File endorsement omitted.]

Endorsed on cover: File No. 35,587. Minnesota Supreme Court. Term No. 665. The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, appellant, vs. The Glidden Company, Marshall Wells Company, Bank of Commerce and Savings, Inc., of Duluth, Minnesota, etc., et al. Filed January 17, 1931. File No. 35,587.

FILE COPY

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CHARLES ELMORE C
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Supreme Court of the United States

OCTOBER TERM, 1930.

Number [redacted] 4

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN,

Appellant,

vs.

THE GLIDDEN COMPANY, ET AL.,

Appellees.

JURISDICTIONAL STATEMENT.

NATHAN H. CHASE,
MORTIMER H. BOUTELLE,
Counsel for Appellant,
Minneapolis, Minnesota.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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Supreme Court of the United States

OCTOBER TERM, 1930.

Number 665.

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN, *Appellant*,

vs.

THE GLIDDEN COMPANY, ET AL., *Appellees*.

JURISDICTIONAL STATEMENT.

The present appeal was taken to review and reverse a final judgment against appellant, rendered by the Supreme Court of the State of Minnesota, such court being the highest court in that state in which a decision could be had of the subject in controversy, as the printed record in this Court has not been received, reference to the paging will be to the printed record in the lower court.

CHRONOLOGY.

The judgment appealed from was rendered and entered in the Supreme Court of Minnesota, December 8th, 1930.

Appellant's petition for appeal, accompanied by its Assignment of Errors and prayer for reversal were presented to the Chief Justice of the Supreme Court of said state, December 18th, 1930.

On the last mentioned date (December 19th, 1930), the Chief Justice of said Court signed the usual Order allowing such appeal and directing that the record therein be certified and transmitted as required by law, to the Supreme Court of the United States.

On the same date, the aforesaid Chief Justice approved the bond or undertaking on appeal prescribed by appellant, in the sum of Ninety Thousand ($90,000) Dollars and signed an Order allowing such bond as a supersedeas.

On the same date, the aforesaid Chief Justice signed a citation, addressed to the appellees in the usual form.

On or about the same date, service of the citation was made on the counsel for appellees and the original citation, with admission of such service, returned to the Clerk of the Supreme Court of the State of Minnesota.

The record on such appeal as stipulated by the parties, was certified and transmitted to the Supreme Court of the United States within thirty (30) days from the date of the Order allowing the appeal.

Such record was filed in the office of the Clerk of the Supreme Court of the United States; the appeal docketed on the October Term calendar for 1930, and assigned Number [redacted] on said calendar on the 17th day of January, 1931.

STATEMENT.

There was drawn in question by the final judgment of the Supreme Court of Minnesota in this cause, the validity of a statute of that state on the ground of its being repugnant to the Constitution of the United States (more particularly the Fourteenth Amendment) and the decision responsive to

which such final judgment was rendered, was in favor of the validity of such statute.

The question arose in a suit instituted, according to the accepted local practice, against several fire insurance companies, of which, appellant was one, to recover the amount of an award determining the aggregate loss and damage to the subject-matter of insurance covered by all the several policies issued by the defendants in a sum slightly exceeding $70,000.00 (R. 2-16).

The arbitration or appraisal resulting in the award indicated and upon which, as stated, the suit was brought, was had responsive to the local statutes of Minnesota, making such arbitration *compulsory*.

Neither appellant or either of the other insurers in any wise appeared or participated in the arbitration or directly or indirectly consented thereto.

The statute prescribing the compulsory arbitration is included in an Act of the legislature of Minnesota adopting what is ordinarily termed a "Standard Form" of fire insurance policies required to be used by all insurers of that class in the state.

General Laws of Minnesota, 1913, Ch. 421.
Mason's Minn. Statutes, 1927, Sec. 3512.

In the original Act to revise and codify the insurance laws of that state and which provided for the Standard Form of policy contract, the provision with respect to the arbitration of the amount of loss and damage was in almost identical language with that customarily employed in the older forms of such policies in general, under which such arbitration was not compulsory but *was made a condition precedent* to any action on the policy.

General Laws of Minnesota, 1895, Ch. 175, Sec. 52.

This provision as corrected by an amendment changing a single word, adopted in 1897, read as follows, after providing for the arbitration or appraisal of the loss and damage:

"And such reference unless waived by the parties shall be a condition precedent to any right of action in law or equity to recover for such loss."

General Laws of Minnesota, 1897, Ch. 254.

This provision as last indicated was carried verbatim into the Revised Statutes of that state for 1905 and remained effective until the Amendment of 1913, making arbitration of loss and damage compulsory.

General Laws of Minnesota, 1913, Ch. 421.
Mahon's Minnesota Statutes, 1927, Sec. 3512.

In passing it may be noted that while a large number of the states have, by legislation, prescribed Standard Forms of policies of insurance, *Minnesota is the only state which has assumed to legislate the requirement of compulsory arbitration indicated.*

It must further be observed that as interpreted by the Supreme Court of Minnesota, an award rendered under this statute is conclusive, no right of appeal being reserved or any revisory jurisdiction being vested in the courts of the state.

The effect of the state in ordinary operation and as applied to appellant in the instant case, was to deny all recourse to the courts with respect to the all important feature of the amount of loss and damage which, in the ordinary case, is tantamount to the determination of liability.

By other provisions of the statutes, the compliance with all of the several laws of the state with respect to the business of insurance; the adoption and use of the prescribed

form of policy, etc., are made conditions precedent to the carrying on and conduct of such business within the state and violation of such provisions visited with criminal consequences.

Mason's Minn. Statutes, 1927, Secs. 3612, 3615, 3616 and 3560.

Appellant was and is a corporation of the State of Wisconsin (R. 3). The statutes of Minnesota provided that with respect to such foreign corporations, a license should be required as a condition to carrying on business in the state. Generally it was provided that such companies should observe all the conditions of the local laws with respect to such business and that violation of any such laws should be visited with a revocation of the license.

Mason's Minnesota Statutes, 1927, Secs. 3711, 3713.

As respects the effect of these various laws, the Supreme Court of Minnesota has held that recognition and observance of all their requirements is compulsory; that the prescribed form of policy is not only the contract between the parties but the law governing their respective rights and that regardless of the form of contract issued, the provisions of the statute are to be interpolated thereon by implication.

The obvious result is that the right of conducting the business in question within that state was conditioned on appellant's consent to the system of compulsory arbitration, thereby relinquishing its constitutional rights (1) due process of law, (2) the equal protection of the law, and (3) the liberty of contract in so far as the latter extended to reserving to itself the ordinary right of recourse to the courts, extended generally to all other lines of business and all other persons. These rights could neither be surrendered nor relinquished by the requirement of any local law without

violation of the provisions of the Fourteenth Amendment.

Terral vs. Burke Construction Co., 257 U. S. 529.
Insurance Co. vs. Morse, 20 Wall. 445.
Barron vs. Burnside, 121 U. S. 186.
Southern Pacific Co. vs. Denton, 146 U. S. 202.
Frost vs. Railroad Commission, 271 U. S. 583.
Hanover Ins. Co. vs. Harding, 272 U. S. 494,

To avoid any misconception, it may be added at this point that appellant is not questioning the general right of the states with respect to prescribing Standard Forms of policies of insurance.

German Alliance Ins. Co. vs. Kansas, 233 U. S. 389.

It is solely contesting the right to interpolate on the form of contract thus provided, a provision making the ascertainment of the amount of loss and damage under such contract by arbitration or appraisal compulsory without insuring any right of income to the Court and thus denying the right of ordinary redress in the courts.

It insists that there is a broad distinction between prescribing the terms of a contract and prescribing the methods by which such contract may be enforced and that it does not follow because the former may be held within the proper scope of the power of police, that that power extends to or embraces the latter.

It contends further that the feature last mentioned falls clearly within the language of this Court in *Coppage vs. Kansas*, 236 U. S. 1, as follows:

> "Now, it seems clear to us that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the

exercise of that power. 'Its true character cannot be changed by its collocation' as Mr. Justice Grier said in the *Passenger Cases*, 7 How. 283, 459."

A similar broad distinction must be made between the legal effect of an award had pursuant to the voluntary agreement of the parties concerned and one resulting from a compulsory requirement of arbitration imposed by law.

The contention that a contract, the terms of which are fixed by law; the acceptance of which is enjoined on the parties and where the provisions of the law are interpolated regardless of its provisions, is a voluntary contract, is wholly untenable in principle and apparently abandoned by the Supreme Court of Minnesota in the present case.

The assumption the resultant act is voluntary because accepted as the alternative of going out of business is sufficiently answered by the terse language of Mr. Justice Lamar in *German Alliance Insurance Company vs. Kansas*, *supra*, as follows:

> "That reasoning would support any statute, for every citizen at least has the right to go out of business. But it has been repeatedly held by this Court that such an answer cannot sustain an invalid statute, the Constitution being intended to secure the citizen against being driven out of business by an unconstitutional statute or regulation."

The pointed allusion by Mr. Justice Holmes in *Block vs. Hirsch*, 256 U. S. 135, 157, is equally pertinent:

> "The power to go out of business, when it exists, is an illusory answer to gas companies and water works, but we need not stop at that."

The language of Chief Justice Taft in delivering the opin-

law of the Court in *Hanover Ins. Co. vs. Harding*, 272 U. S. 494, forecloses discussion on any such untenable theory:

> "One argument urged against our conclusion is that the relation of a foreign insurance company to the state which permits it to do business within its limits, is contractual, and that by coming into the state and engaging in business on the conditions imposed, it waives all constitutional restrictions, and cannot object to a condition or law regulating its obligation, even though, as a statute operating *in invitum*, it may be in conflict with constitutional limitation. This argument cannot prevail in view of the decisions of this Court in well considered cases."

The situation in this regard is not essentially different from what it would have been, had the statute prescribed that the Standard Form of policy should include a condition or stipulation, that the defendant would not remove any suit originating thereunder into the courts of the United States.

Terral vs. Burke Construction Co., supra.
Barron vs. Burnside, supra.

As applied in practice and sustained by the judgment here appealed from, if an insurer declines to submit to arbitration, the assured, having made a demand therefor and designated an arbitrator, may apply to some judge of a local court for the appointment of an umpire. The tribunal thus constituted may arbitrate and determine the amount of the loss. The finding is conclusive, no right of appeal or judicial review being reserved.

It should require no argument to demonstrate that if the particular scheme thus conceived is within the constitutional power of the legislature, a variety of different schemes, hav-

ing the same ultimate objective, would be equally permissible. The particular machinery is largely unimportant if the validity of the principle be upheld.

If such schemes may be applied to insurance losses, no reason suggests itself why the same might not be extended to innumerable other lines of business, as, to illustrate, losses to property by common carriers or accidents arising out of personal injury.

Results of this character were attempted by early statutes in the respective states of Montana and Colorado and in both instances, held unconstitutional by the Supreme Courts of those states as violative of the Fourteenth Amendment.

Graves vs. Northern Pacific Ry., 5 Mont. 566.

Wadsworth vs. Union Pac. Ry., 18 Colo. 600.

The Procedure in the State Courts.

The award, as already indicated, was made in a proceeding in which neither the appellant or other insurers involved, participated.

It was followed by a suit instituted according to the permissible local practice, against all of the insurers.

Each of the insurers, by its several Answer in the court of original jurisdiction, challenged the validity of the award on the ground of the invalidity of the statute of the state under which the award was rendered (R. 21).

The statute was challenged as violative of the requirements of the Fourteenth Amendment in denying (1) due process of law, (2) equal protection of the law, and (3) the liberty of contract.

On the trial in the court of original jurisdiction, the plaintiffs (appellees) established that they had followed the statutory procedure as respects (1) appointing an arbi-

trator, (2) demanding a similar appointment by the insurers, (3) failure of the latter to make such appointment, (4) application to a local judge for the designation of an umpire, and (5) the rendition of the award by the originally appointed arbitrator and designated umpire.

There was no evidence offered before the Court of the amount of loss and damage sustained, other than the award itself (R. 23-43).

The insurers (defendants) offered no evidence (R. 57).

Issues having been previously framed for submission to a jury, at the close of the evidence, the defendants severally moved for a directed verdict assigning as the ground of such motions, the invalidity of the award by reason of the unconstitutionality of the statute pursuant to which it was rendered as contravening the provisions of the Fourteenth Amendment (R. 57).

Defendants' motions for a directed verdict were denied and exceptions seasonably reserved. The trial court thereupon directed a verdict in favor of the plaintiffs (appellees) for the full amount of the award as rendered ($77,001.46), reserving for itself the question of apportionment between the several insurer defendants (R. 57-58).

Thereafter, the trial court made its Findings of Fact, apportioning the liability amongst the several defendants and ordering the rendition of several judgments against them in the amounts as thus ascertained, the judgment rendered against appellant being slightly in excess of $8,600.00 (R. 59-73-77-78).

From the judgments as thus rendered, each of the defendant insurers appealed to the Supreme Court of the state (R. 78-79).

As in the lower court, the only question raised on the appeal was as to the validity of the statute, pursuant to

which, the award will remain. The other questions in the latter regard were raised on the appeal that were passed below, as already indicated.

The decision of the Supreme Court sustained the validity of the statute and affirmed the judgments rendered below. It was specifically found and determined by the opinion of the Supreme Court that the statute was not invalid on the grounds urged by the appellants and that that statute did not contravene the provisions of the Fourteenth Amendment. Final judgment was accordingly entered in that court.

By stipulation filed in that court, it was agreed that in the event of an appeal to the Supreme Court of the United States, that such appeal might be taken on behalf of either of the insurers from the judgment rendered against such insurer and that the other causes should abide the event, conditioned on the filing of a bond to be approved by the Court in sufficient amount to cover the aggregate liability of all the defendants.

Appellant thereupon filed its bond or undertaking in the form required by statute. Such bond, as already stated, was approved by the Chief Justice of the Supreme Court of the state as a supersedeas and a stay order entered in all of the several cases awaiting the event of the present appeal.

Jurisdictional Statement.

(a) The statutory provision sustaining the jurisdiction on this appeal is as follows:

Act of Feb. 13th, 1925, Ch. 229, 43 Stat. 936.

U. S. Code, Title 28, Sec. 344 (a).

Judicial Code, Sec. 237a, as Amended by Act of Feb. 13, 1925.

The appeal as substituted for a writ of error is covered by the following:

Act of Jan. 31, 1928, Ch. 14, 45 Stat. 54.

Act of April 26, 1928, Ch. 440, 45 Stat. 466.

(b). The date of the judgment appealed from has already been indicated as has also been the date of the allowance of the appeal by the Chief Justice of the Supreme Court of the State of Minnesota.

As thus shown, all of the proceedings with respect to perfecting the appeal were had within thirty days of the rendition of the judgment appealed from; the record on appeal transmitted and the appeal docketed in this case within substantially the same time.

(c) The nature of the case and the ruling of the Court below has already been indicated and the case is thus brought within the statutory provision as one where there was brought in question the controversy challenges the validity of a state statute, on the ground of its repugnance to the Constitution of the United States and the decision of the highest court of the state in which a decision in the suit could be had was in favor of the statute's validity.

(d) As the particular provision of the jurisdictional statute here involved is substantially the same as that provided by Act of September 24, 1789, Ch. 20, Sec. 25; was retained by the Amendatory Act of Feb. 5, 1867, Ch. 28; carried into the Revised Statutes as Sec. 709 and thence into the Judicial Code of 1911 as Sec. 237, a citation of cases claimed to sustain the jurisdiction would cover the field of Federal procedure from the beginning.

It is assumed that this is not required and reference will therefore be limited to the following more recent cases:

Merchants National Bank vs. Richmond, 256 U. S. 635.

Eureka Pipe Line Co. vs. Hallanan, [illegible]

DeJonge-Walker Co. vs. Bondurant, 267 U. S. [illegible]

Dorchy vs. Kansas, 272 U. S. 306.

Warehouse Co. vs. Tobacco Growers, 276 U. S. 71.

While not pertinent to the precise jurisdictional question here involved, reference *arguendo* may be made to the extended and scholarly review of the broad subject of jurisdiction in *King Mfg. Co. vs. Augusta*, 277 U. S. 100, in both the prevailing and dissenting opinions.

Respectfully submitted,

NATHAN H. CHASE,

MORTIMER H. BOUTELL,

Counsel for Appellant,

Minneapolis, Minnesota.

FILE COPY

MAR 9 1931

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 4

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN, *Appellant,*

vs.

THE GLIDDEN COMPANY, ET AL., *Appellees.*

REPLY TO APPELLEES' BRIEF ON JURISDICTION.

NATHAN H. CHASE,
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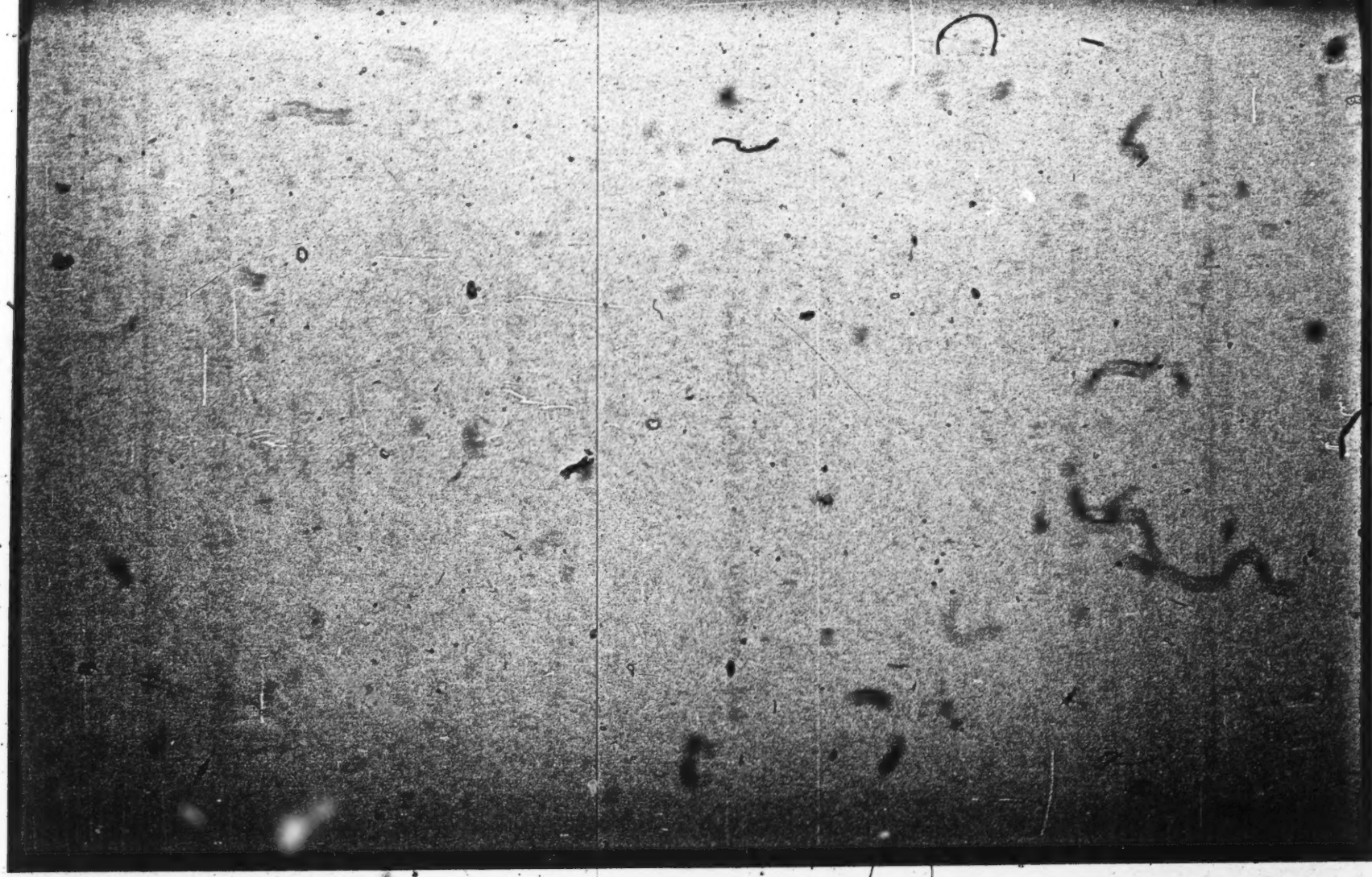

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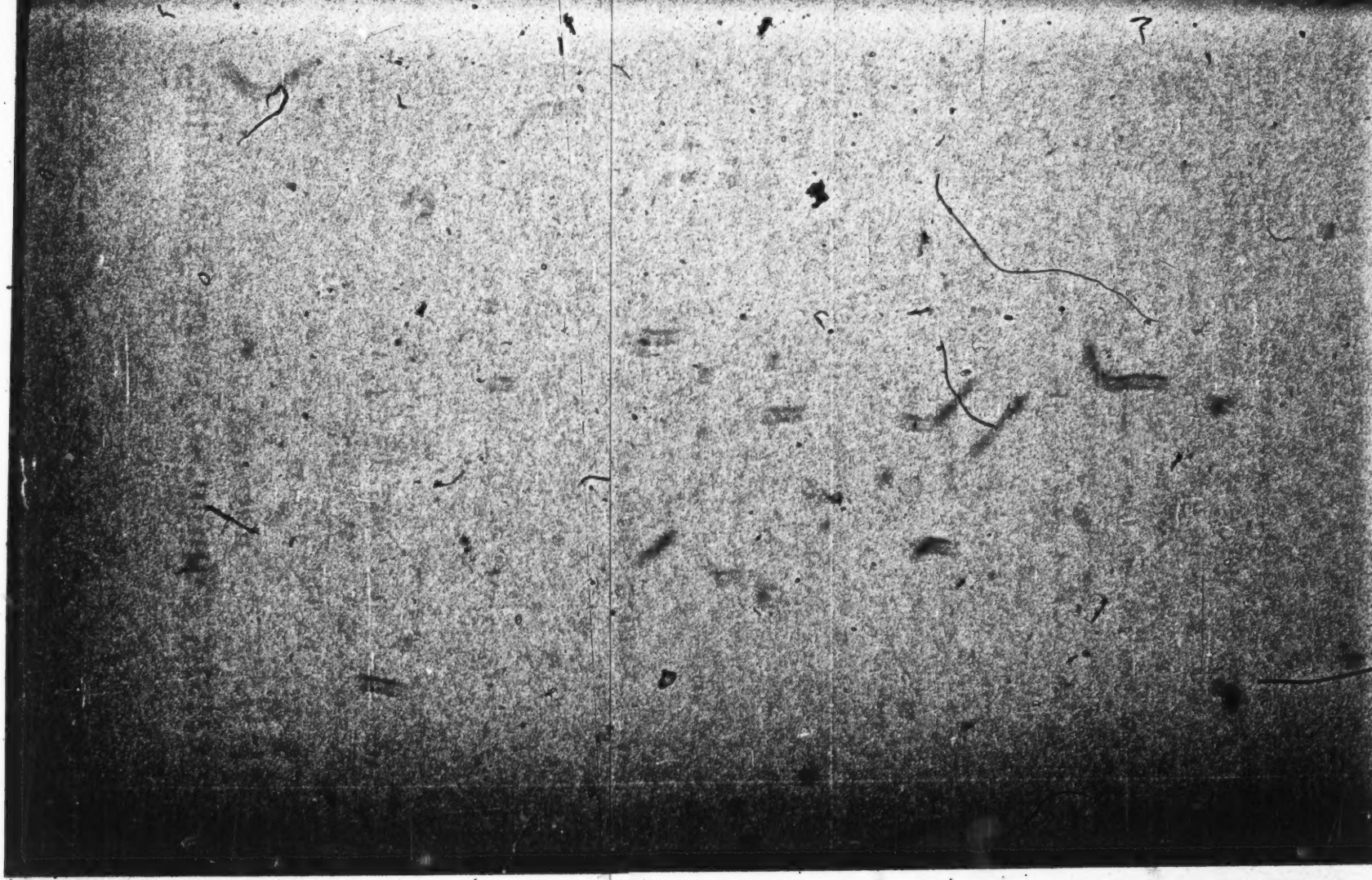

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 605.

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN,

Appellant,

vs.

THE GLIDDEN COMPANY, ET AL.,

Appellees.

REPLY OF APPELLANT ON JURISDICTION.

The brief or statement of appellees in opposition to the jurisdiction on the present appeal is so obviously misleading and evasive as to justify this statement in reply.

At the outset it is broadly stated the decision of the Supreme Court of Minnesota was placed on distinct grounds, one federal and the other non-federal; that both grounds were substantial; that the decision may be sufficiently rested on the non-federal ground and that the judgment is therefore not appealable.

The first answer to this is that it is not a fact. There is no allusion in the opinion to any non-federal ground. The contention proceeds from inference and the fact that the Court cited its previous decision in *Itasca Paper Co. vs. Niagara Fire Insurance Company*, 175 Minn. 73. It will be observed, however, that in the case under review, the opinion excluded all reference to the theory of voluntary

contracts on which the idea of a non-federal ground of decision is based. The reason for the omission will be presently adverted to.

The second answer to the contention is sufficiently indicated in the numerous holdings of this court to the effect that the untenable assertion and reliance by a state court on a non-federal ground is not conclusive.

The principle was clearly stated, and the authorities cited, in *Ward vs. Love County*, 253 U. S. 17, in the syllabus, as follows:

> "The jurisdiction of this court to review a judgment of a state court the effect of which is to deny a federal right, cannot be avoided by placing such judgment on non-federal grounds which are plainly untenable."

The opinion, which expounded the principle in more detail, added the following terse comment:

> "Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided."

It is unnecessary to cite the many cases in which the rule thus indicated has been applied. To characterize a contract, the form of which is prescribed by statute; the terms of which are made compulsory and failure to employ which is visited with criminal responsibility as well as the forfeiture of the privilege of doing business; as voluntary, is an anachronism.

Of the statutory requirements thus indicated, the Supreme Court of Minnesota said in *Wild Rice Lumber Company vs. Royal Insurance Company*, 90 Minn. 190:

> "A glance at the history of the standard form of policy makes it very clear that the legislature of this

state intended to deprive insurance companies of the right to add to or change the terms and conditions of the prescribed form. * * * The conclusion is inevitable that the legislature intended to deprive the parties of the right to make insurance contracts in any form except as prescribed by the statute."

In *Heim vs. American, etc., Insurance Company*, 147 Minn. 283, 288, after referring to the statutory form of policy, it was said:

"Its use is compulsory. With such changes as are authorized by statute, it is the only form of fire insurance contract which may lawfully be used in this state. Its provisions not only constitute the contract between the insurer and the insured, but the law governing the rights of the parties as well."

In the same case it was held that where the contract between the parties failed to incorporate the statute or its requirements, the latter would be interpolated thereon by implication.

The resulting situation falls more nearly under what this court has characterized as agreements exacted by the state through "duress."

In *Union Pacific Ry. Co. vs. Public Service Comm.*, 248 U. S. 68, this court held that the question whether there was any basis for the assertion that a federal right had been waived, was for its own determination, adding:

"Were it otherwise, as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it and then to declare the acceptance voluntary as was at

excepted in *Atchison, Topeka & Santa Fe Ry. Co. vs. O'Connor*, 223 U. S. 280."

It will be observed that precisely the same question would arise if the legislation had prescribed, and the Standard Form of policy contained, a provision waiving recourse by the insurer to the Federal Courts.

In the Itasca case, the Supreme Court of Minnesota indicated as one of the grounds of its decision on the constitutional question, the idea of a voluntary contract. That case resulted in a reversal and thus precluded, bringing the constitution question before this court.

In re-arguing the question in the instant case, it was shown that the theory of voluntary contract was wholly inconsistent with and destructive of the *compulsory system of arbitration*. This, for the very obvious reason, that from the earliest times that court had held the appraisal in insurance cases as having all of the ordinary attributes of a common law arbitration. Considered from the standpoint of a voluntary contract (excluding the statutory sanction and compulsion) the submission would be subject to revocation by either party at any time before an award was rendered. The inescapable conclusion thus indicated presumably explains the omission of any reference in the decision in question to the theory of a voluntary contract and the emphasis laid on the compulsory requirement of the statute.

The features thus indicated should effectually exclude the contention of a non-federal ground in the instant case.

The statement that most of the states have prescribed standard forms of policies incidentally incorporating compulsory features for appraising the amount of loss and dam-

age in insurance cases [illegible] the least disingenuous.

Minnesota, as counsel well know, is the only state which has assumed to prescribe the compulsory system [illegible] question. No other state has assumed to prescribe a system denying insurers the right of recourse to the courts for the purpose of determining the amount of their liability, excepting in cases where that right is voluntarily waived.

Under the common and ordinary form of contract, the insurer may require arbitration of the amount of loss or damage and until such requirement is acceded to, non-compliance may be asserted (unless otherwise waived) as a defense to an action on the policy. The assured does not lose his right but is merely held to the terms of the agreement prescribing that arbitration, where demanded, shall be a condition precedent to suit brought.

The case presents an anomalous aspect in the circumstance that the Supreme Court of Minnesota has held that the legislature of that state has no constitutional authority to authorize the compulsory reference by a court, of an issue arising in an action at law.

St. Paul, etc., Ry. vs. Gardner, 19 Minn. 132.

It is interesting to surmise, in determining the question of legislative authority, where any legal distinction can be found between an act which assumes to confer upon the courts of the state, the right to require a compulsory reference and an act which confers a similar right on one of the parties to a contract without the intervention of the court. The contention the legislation has been acquiesced in, is not germane. An unconstitutional law is not purged of its vice by age. The statement, however, is not in strict accord with the fact. The constitutionality of the law was [illegible]

lunged in *Abromowitz vs. Continental Ins. Co.*, 170 Minn. 215, and again in the Itasca case, *supra*.

Were the fact otherwise, however, the court will immediately perceive the practical phases with which the insurers have been confronted and the consequent, though perhaps ill-advised, policy which has prompted submission to the imposition of this reprehensible law. The suggestion that the requirements of the law are not discriminatory calls to mind the terse statement of Chief Justice White in *Harrison vs. St. Louis, etc., Ry. Co.*, 232 U. S. 318, 332, as follows:

> "At once it is to be observed that the contention proceeds upon a self-evident misconception which is this, that if only wrong be indiscriminately done, it becomes rightful."

Allusion to the fact that the insurers are not denied recourse to the courts is distinctly misleading.

The award is conclusive. There is neither right of appeal nor review by the courts. The authority of the arbitrators has been thus stated by the Supreme Court of Minnesota in *American Central Ins. Co. vs. District Court*, 125 Minn. 374, 378:

> "In the case at bar the appraisers must determine many matters other than the mere value of specific property produced before them for examination and appraisal. They must determine the quantity of property covered by the policy and on hand at the time of the fire, the quantity destroyed, the quantity damaged, whether the damage resulted from causes covered by the policy or from other causes not covered thereby and various other questions, both of law and fact, upon which the parties may differ."

The award rendered by the extra-judicial body thus con-

templated may be impeached for fraud or corruption of the arbitrators or appraisers. The circumstance that the award is grossly excessive may constitute evidence of fraud as in cases of arbitrations in general.

Christiansen vs. Norwich Union Fire Ins. Co., 84 Minn. 526.

The reference to those great landmarks in insurance law of *Scott vs. Avery*, 5 H. L. Cas. 811, and *Hamilton vs. Insurance Co.*, 136 U. S. 242, is so profoundly irrelevant to anything with which the instant case is concerned as to cause bewilderment.

The repeated allusion to the thousands of dollars collected in premiums from policyholders while this provision of the law has been in effect, has not been overlooked. There is, however, a shrieking silence in the omission of any allusion to the hundreds of thousands of dollars in which the insurers have been mulcted as a result of this law and the *ex parte* arbitrations thereunder, of the large class of losses which shrink from the publicity of ordinary judicial investigation.

As the idea last indicated has been injected in the argument without justification, counsel have no hesitation in saying that no system was ever evolved which placed a greater premium on unscrupulous "adjusters" for the assured or subjected the insurers to more unconscionable fraud.

The brief of appellees on the question of jurisdiction in the instant case, has obviously been prepared as an anticipatory argument on the merits, aimed at minimizing the importance of the questions involved and prejudicing their ultimate consideration by the Court.

The procedure thus followed does not accord with the obvious purpose of the rule of this Court; is distinctly un-

false and prejudicial to appellant and should be regarded accordingly.

The concluding statement, in effect, that the controlling principles have already been decided is disclosed as a fiction from the circumstance that no law of similar character to that here involved has ever been enacted by any other state than Minnesota and no case has ever been brought before this Court in which that law was involved.

Fundamentally, as shown in our original statement of jurisdiction, the instant case has to deal with an attempted legislative extension of the police power to a subject wholly without the domain of matters to which that power may address itself, within the principles decided by this Court. In its arbitrary exactions, it transcends the limits which have been fixed by this Court respecting the interference with the ordinary liberties of contract unless it be assumed (which this Court has expressly denied in many cases) that all constitutional barriers may be struck down. It lacks even the sanction of assumed evils which was stressed in the recent decision of this Court in *O'Gorman & Young, Inc., vs. Hartford Fire Insurance Company*, Adv. Op. 162 (51 Sup. Ct. Rep. 130). At least it suggests nothing in this latter regard which might be made an excuse for the denial of due process of law in almost innumerable other branches of ordinary affairs.

Finally, it invokes the application of the rule which was stated in the recent opinion in *United States vs. Chicago, Milwaukee & St. Paul Ry. Co.*, Adv. Op. 142 (51 Sup. Ct. Rep. 158), in the following language:

"Broadly stated, the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a

condition prescribed by the statute [illegible] provisions of the Federal Constitution.

The case of appellant is clearly within the terms of the statute cited in our original statement and the merits of the questions of law involved should not be anticipated on the consideration of the preliminary question of jurisdiction.

Respectfully submitted,

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FILE COPY

APR 18 1931
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1930.

NUMBER [illegible]. 4

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN, *Appellant,*

vs.

THE GLIDDEN COMPANY, ET AL., *Appellees.*

APPELLANT'S BRIEF.

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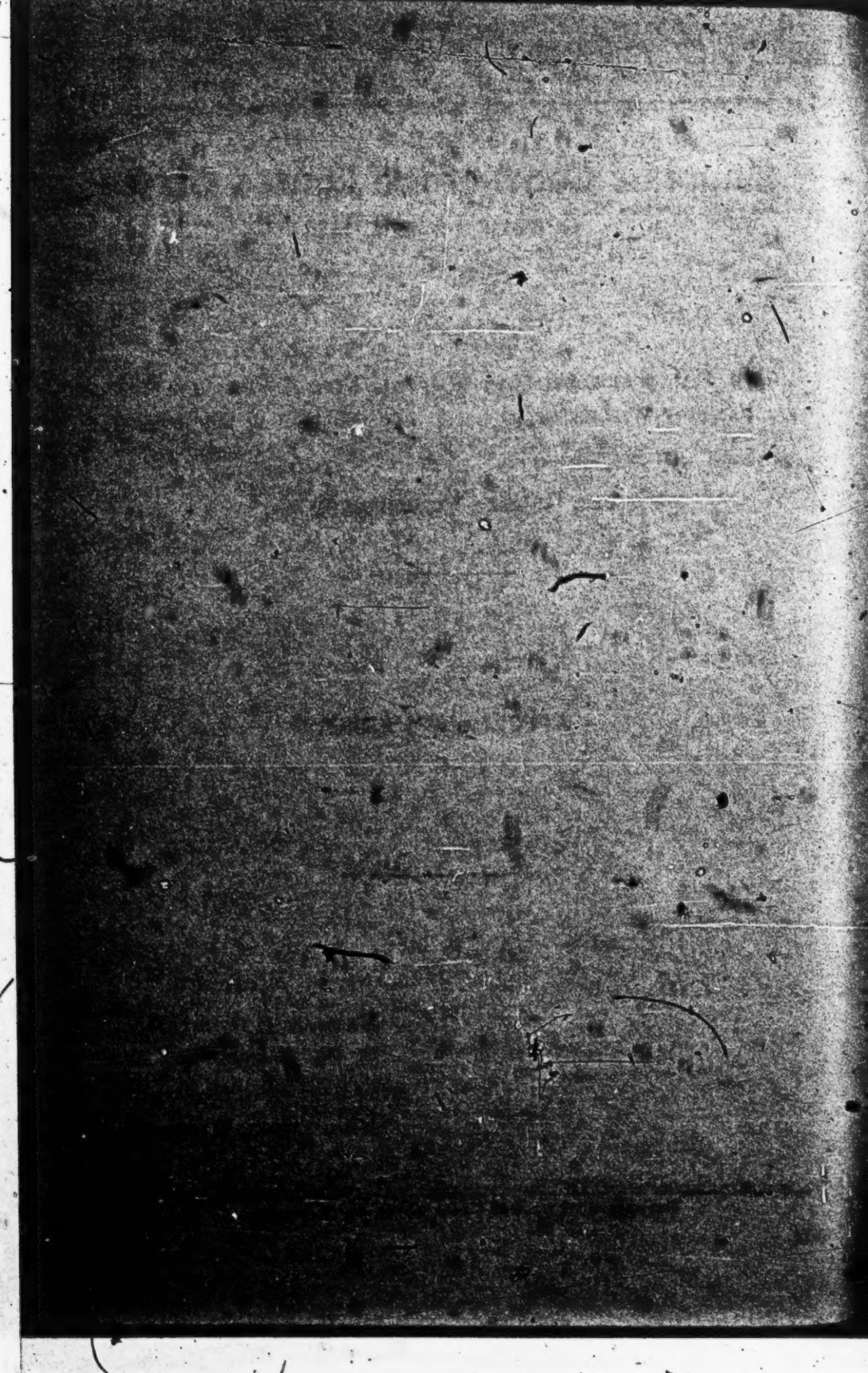

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Supreme Court of the United States

OCTOBER TERM, 1930.

NUMBER 665.

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN,

Appellant,

vs.

THE GLIDDEN COMPANY, ET AL.,

Appellees.

APPELLANT'S BRIEF.

The present appeal was taken to review and reverse a final judgment against appellant rendered by the Supreme Court of the State of Minnesota, that court being the highest tribunal in the state in which a decision of the subject matter in controversy could be had. The controversy below turned on the validity of a statute of the State of Minnesota asserted to have been violative of the Constitution of the United States. The decision affirmed the statute's validity.

STATEMENT.

For the purpose of presenting the issues arising on the present appeal, a relatively brief statement of the case will suffice.

The State of Minnesota has adopted, and for many years there have been in force in that state, statutes regulating

[illegible] and control of the various branches and [illegible] of the insurance business. The instant case deals with so much of that system as relates to the business of fire insurance.

The general system had its inception in 1895, in which year, in the general statutes of the state, it was codified and revised. Incidentally, it was provided by those laws that no contract (policy) of fire insurance should be written by any insurance company in that state, covering property therein, except under what was termed the "Standard Form" of policy, the terms of which were prescribed by the statute and the use whereof, in all cases, as held by the court of last resort of that state, made compulsory.

General Laws of Minnesota, 1895, Ch. 175.

The requirements of the law extended to both domestic and foreign insurance companies and, as will be presently shown, the original and amendatory law imposed various penalties, criminal and otherwise, for the violation of any of their provisions by either insurance companies or their agents.

The standard form of policy thus prescribed was, in many respects, similar to those adopted in various of the other states. Such differences as existed in the originally prescribed form are not material to the present issues.

Amongst others of these provisions prescribed by the statute and required to be incorporated in all insurance policies written and covering property in the state, was one relating to the subject of ascertaining the amount of loss and damage by arbitration. In the original form, this provision followed in substance the terms customarily employed in the older forms of policies antedating the legislative systems, as well as the similar provisions provided by the laws of the various

precedent to any action on the policy.

Thus, by Section 65, Ch. 175, of the General Laws of 1895, as corrected by Ch. 254 of the General Laws of 1897, the statute, after providing for arbitration respecting the amount of loss and damage, continued as follows:

> "And such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

As far as here material, the provisions of the General Laws of 1895 were carried verbatim into the Revised Statutes of Minnesota for 1905 and thereafter continued effective until 1913. By the General Laws of the year last stated a change was made in the standard form of policy with respect to the subject of arbitration of the amount of loss and damage. For the previous provision, there was substituted one making arbitration in all cases, unless waived by both parties, compulsory.

General Laws of Minnesota, 1913, Ch. 421.
Mason's Minnesota Statutes, 1927, Sec. 3512.

This provision, as construed by the Supreme Court of that state (a subject to be considered in more detail in the later argument) required insurers, in all cases, to submit to arbitration on the demand of the assured and prescribed a system whereunder, in the event the insurer declined to arbitrate, a board of arbitrators could be completed by application to some judge of a local court for the appointment of an umpire to act with the arbitrator designated by the assured.

penalties otherwise prescribed.

Id.

Appellant was a corporation organized under the laws of Wisconsin and at the time in controversy, licensed to [illegible] on the business of fire insurance in Minnesota (R. 31).

On or about April 3, 1924, appellant issued to [illegible] Hardware Company, a Minnesota corporation engaged in the general mercantile business in the city of [illegible], a policy of fire insurance in the standard form prescribed and dedicated, thereby insuring a miscellaneous assortment of merchandise and other property of the assured against loss or damage by fire, in the sum of $9,000.00 (R. 8).

Additional concurrent policies, insuring the same subject matter, were issued by other insurance companies bringing the aggregate total of outstanding insurance at the time of the loss to the amount of approximately $30,000.00 (R. 4).

All the insurance thus indicated was outstanding and in force on March 9th, 1929, on which date a fire occurred resulting in loss and damage to the insured property (R. 10).

Following the date of the loss, demand was made in the usual form by the assured for arbitration of the amount of loss and damage (R. 32-33). The insurers declined to participate in such arbitration and thereupon application, in accordance with the provisions of the statute, was made to a judge of one of the local courts for the appointment

as umpire to act with the arbitrator designated by the assured in determining the amount of loss (R. 33-37).

The appointment last indicated having been made, the board of arbitrators thus comprised, after notice to the insurers, proceeded to determine the amount of the loss. The insurers neither appeared nor in anywise participated in the proceeding. On April 20th, 1929, an award was returned by such arbitrators finding and determining the sound value of the insured property immediately preceding the fire in a sum slightly exceeding $81,000.00 and that the resulting loss and damage thereto occasioned by the fire was $74,904.91 (R. 42-43).

Following the rendition of the award, notice thereof was given to the insurers and demand made for payment thereof. The insurers having refused to recognize such demand, action was instituted on the award by appellees as the assignees of the assured's claim (R. 15).

In accordance with the permissible local practice, all of the insurers were made parties defendant. The complaint alleged in detail the several matters thus referred to, including the rendition of the award and refusal to pay the amount thereof and prayed judgment against the insurers for their respective proportionate amounts (R. 12-15).

The insurers, by their several answers, specifically challenged the validity of the award on the grounds that the statute under which the same was rendered contravened the provisions of both the state and federal constitutions. As respects the latter, the statute was alleged as violative of the provisions of the Fourteenth Amendment; in that it constituted a denial of (1) due process of law; (2) the equal protection of the law, and (3) the ordinary liberty of contract.

Preliminary to the trial in the court of original jurisdiction, an order was made providing that all of the issues

excepting that of the proportionate [illegible] dants should be submitted as a fact. (R. 56)

On the trial of the cause, plaintiffs introduced in evidence the formal matters, including the issuance of the several policies; the date of the loss; the [illegible] tration; the proceedings for the appointment of an appraiser, the composition of the board comprising the [illegible] inally designated by the assured and the [illegible] by the court, and the rendition of the award (R. 56-57).

No evidence was offered or received on behalf of the plaintiffs (other than the award) either with respect to the actual value of the subject-matter of the insurance immediately preceding the fire or of the amount of the loss and damage sustained thereto as a result of the fire.

At the conclusion of the plaintiffs' evidence, the defendants rested. They thereupon severally moved the court for a directed verdict, assigning as the grounds of such motion the invalidity of the award by reason of the unconstitutionality of the statute pursuant to which it was rendered. The constitutional grounds with respect to the Federal Constitution urged in support of the motion were those hereinabove indicated (R. 57).

These motions were severally denied, the insurers reserving exceptions to the ruling in each instance (R. 57).

Under direction of the court, a verdict was returned in plaintiffs' favor in the sum of $77,001.46 (R. 57-58), which was supplemented by Findings of Fact and Conclusions of Law made by the court, in which the amount of the verdict was apportioned to the several insurers (R. 59-75).

Following the denial of a motion, under the local practice, for judgment notwithstanding the verdict (R. 75-76), judgments were severally entered against the defendants (R. 77-

ing the Fourteenth Amendment of the Constitution of the United States.

Third: The Supreme Court of the State of Minnesota erred in its decision and judgment herein, in failing to hold that the above quoted statute, as applied to this appellant, infringed the requirements of the Fourteenth Amendment of the Constitution of the United States in the following particulars, viz.:

(a) That it denied to appellant due process of law.

(b) That it denied to appellant the equal protection of the law.

(c) That it denied to appellant the liberty of contract.

Fourth: The Supreme Court of the State of Minnesota erred in its decision and judgment herein, in failing to hold that the above quoted statute violated the provisions of the Fourteenth Amendment of the Constitution of the United States in that it required of appellant, as a condition of the right to carry on and conduct its business in said state, the surrender of rights guaranteed by the Federal Constitution.

Fifth: The Supreme Court of Minnesota erred in holding that an award rendered under the aforesaid statute in proceedings in which petitioner in no wise participated was binding or valid or binding on petitioner.

Sixth: The Supreme Court of Minnesota erred in rendering final judgment of affirmance against petitioner.

ARGUMENT.

I.

General Features.

The several Assignments of Error in this [illegible] involve a single constitutional question, viz., the [illegible] the state to prescribe, as a condition to the carrying [illegible] the business of fire insurance within its limits, a system of *compulsory arbitration* respecting the obligations [illegible] out of the conduct of that business.

The effect of the prescribed system embodying the [illegible] ment thus indicated and imposing the mass of [illegible] ance companies as a condition to the right of doing [illegible] in that state cannot be obscured by generalization. The result, as applied in the instant case, is, that [illegible] single class of business and the contracts necessarily incident thereto, the legislature has assumed to [illegible] of the parties and to have prescribed in advance [illegible] corporations engaged in carrying on this particular [illegible] might waive the ordinary rights of parties in general [illegible] mit their controversies to judicial determination [illegible] as a substitute for the latter, the arbitrament and [illegible] tion of an extra-judicial body.

The results in this regard proceed from a complicated [illegible] tem of legislation which has assumed to prescribe [illegible] inate practically all of the varying features of [illegible] the business of fire insurance in that state. [illegible] system, as already indicated, the form of policy [illegible] prescribed and its employment made compulsory, as a [illegible] tion of the right of license to do business in the state.

As indicated in the appended statement, the [illegible] of the prescribed conditions is not only made a [illegible]

continuance of the insurer's license in the state but violation of the prescribed conditions is visited with criminal penalties. Extracts from the various statutory provisions are appended which will prove sufficient for the review of the questions with which we are here concerned."

The interpretation of these statutes and the resulting system thereunder devised has been indicated in a series of decisions of the Supreme Court of the state, of which the following are sufficiently illustrative.

In *Wild Rice Lumber Co. vs. Royal Insurance Co.*, 99 Minn. 156, 158, it was stated:

"A glance at the history of the standard form of policy makes it very clear that the legislature of this state intended to deprive fire insurance companies of the right to add to or change the terms and conditions of the prescribed form. The right to make such changes and additions is one of the principal distinguishing characteristics of the two classes of standard forms. * * * But the legislature of 1897, amending Section 53, C. 175, Laws 1895, in express terms prohibited the making of any changes except such as were specifically enumerated in the statute. The conclusion is inevitable that the legislature intended to deprive the parties of

[illegible]

[illegible]

[illegible]

"the right to make insurance contracts in any form as prescribed by the statute. * * * [T]he standard form, with the changes thus authorized, is the only form of fire insurance contract authorized by the laws of this state." (Italics ours.)

In *Hess vs. American Alliance Insurance Co.*, 147 Minn. 288, 290, it was said:

"In prescribing the form of standard policy, the legislature sought to secure uniformity in all contracts of fire insurance. * * * [I]t was a compulsory * * * such changes as are authorized by statute, it is the only form of fire insurance contract which may lawfully be used in this state. * * * [I]ts provisions not only constitute the contract between the insurer and the insured, but the law governing the rights of the parties as such." (Italics ours.)

As respects the particular feature of arbitration with which we are here concerned, the subject was fully considered in *Hippocrates vs. Continental Insurance Company*, 178 Minn. 215, wherein, after setting forth the statutory provision, the following was stated:

"This statute is the last expression of the legislature

"Every company and every agent who shall wilfully make, issue or deliver a policy in violation of Section 1517 shall be guilty of a misdemeanor, and every execution of such policy in force at the time shall participate in liability upon the company issuing the same." (Sec. 1518.)

"In case of the failure of any company to comply with any of the provisions of this act, its right to transact business in this state shall cease, and it shall be the duty of the commissioner of insurance to immediately institute the proper proceedings in case of such refusing such company shall not be entitled to transact business in this state for a period of one year from date of such revocation." (Sec. 1519.)

"Any insurance company of another state, * * * complying with all laws governing such corporations in general * * * shall be entitled to do business in this state." (Sec. 1711.)

will and covers the whole subject of appraisal. It must therefore be taken as an implied repeal of G. S. 1923, Section 3519, * * *

Plainly the statute expresses no intention to deny the insured the right to an appraisal, even when the insurer denies liability. In fact the right of each party to demand one is recognized explicitly. Neither can it be said that the statute does not contemplate an appraisal even though one of the parties fails to select an appraiser. The adoption of that conclusion would ignore this clear language:

> 'In case either party fails to select an appraiser within such time, the other appraiser and the umpire selected, as herein provided, may act as a board of appraisers, and whatever award they shall find shall be as binding as though the two appraisers had been chosen.'

* * * The provision last quoted must be taken in connection with the rest of the paragraph. It means that in case either party fails to select an appraiser the other may have an umpire appointed in the manner provided in case two appraisers fail to agree upon one.

"In case of the failure of any such insurance company to comply with any of the provisions of this act, * * * its right to transact the insurance business in this state shall cease, and it shall be the duty of the insurance commissioner to immediately declare its license revoked; and in case of such revocation, said company shall not be again licensed to transact business in this state for the period of one year from date of such revocation." (Sec. 1713.)

"Every company, and every officer and agent of any company, making, issuing, delivering or tendering any policy of insurance of any kind or directing any of the same to be done, in wilful violation of any of the provisions of law, for a first offense, shall be guilty of a misdemeanor, and for each subsequent offense, of a gross misdemeanor; and, in addition to all other penalties prescribed by law, every company issuing any such policy shall be disqualified from doing any insurance business in this state until the payment of all fines imposed and for one year thereafter." (Sec. 1761.)

The statute has been so interpreted since the decision in *O'Rourke vs. German Ins. Co. of [illegible]*, Minnesota, [illegible] 104 N. W. 900, as to make inapplicable the [illegible] there made that the statute has no application to a case where a referee nominated by one of the parties refuses to act as such; for the court is only authorized to appoint a third referee.' Since that time and by L. 1913, p. 61[illegible] c. 421, there has been put into the statute the [illegible] for the selection of an umpire and an award even [illegible] one party does not nominate an appraiser.

* * * The first consideration is that the obligation to arbitrate arises *from explicit law*, as well as contract." (Italics ours.)

The compulsory character of the prescribed arbitration was reasserted in *Itasca Paper Company vs. Niagara Insurance Co.*, 175 Minn. 73, later herein referred to as well as in the instant case where the result of such an arbitration was confirmed and made the basis of the judgment appealed from.

The functions of arbitrators in such cases were thus indicated in *American Central Insurance Co. v. District Court*, 125 Minn. 374, 378:

"In the case at bar the appraisers must determine

"Every officer and agent of any insurance company, required by any provision of this chapter to make any report or perform any act, who shall neglect or refuse to comply with such requirement, and every agent, solicitor or collector of such corporation in this state who fails or neglects to procure from the commissioner a certificate of authority to do such business, or who fails or refuses to comply with, or violates, any provision of the insurance law, shall be guilty, for the first offense, of a misdemeanor, and for each subsequent offense of a gross misdemeanor." (Sec. 3763.)

"Whoever violates any provision of the insurance law, where the nature of the offense is not specifically designated herein, shall be guilty, for the first offense, of a misdemeanor, and for each subsequent offense of a gross misdemeanor." (Sec. 3764.)

[illegible] which [illegible] the mere value of specific [illegible] produced before them [illegible] examination had ap[illegible] [illegible] They must determine the quantity of property covered by the policy and on hand at the time of the fire, the quantity destroyed, the quantity damaged, whether the damage resulted from causes covered by the policy or from other causes not covered, thereby, and various other questions, both of law and fact, upon which the parties may differ."

The proceeding itself has been uniformly held as having the attributes of an ordinary common law appraisal. Thus it was stated in *Christianson* vs. *Insurance Company*, 84 [illegible]:

"The board of referees provided for under the standard policy is a quasi-court, subject to the principles governing common law arbitration."

In *American Central Ins. Co.* vs. *District Court*, 125 Minn. [illegible], it was said:

"The appraisements made thereunder have generally been considered as of the nature of common-law arbitrations, and as governed by the rules applying to such proceedings, except as otherwise expressly provided. This state has always adopted that view of the law."

To the same effect:

Prudence Refrigerating Co. vs. *Insurance Co.*, 91 Minn. [illegible];

Northern Market Home Co. vs. *Insurance Co.*, 147 Minn. [illegible].

It necessarily follows from the principles thus indicated that appraisals in such cases are possessed of similar attributes to those considered in common law arbitrations in general.

awards may be impeached upon familiar grounds, [illegible]
ceipts for fraud or misconduct of the arbitrators, [illegible]
wise, they are final and conclusive, as already stated.

Christianson vs. Insurance Co., *supra*.

Produce Refrigerating Co. vs. Insurance Co., *supra*.

From the practical standpoint, the [illegible] system thus indicated is apparent. Every insurance company doing business in the state is compelled to issue the prescribed form of policy contract. In the event of a loss within the terms of that contract the insured may be, and in the instant case, was, denied right of access to the courts for the determination of the amount of its liability. In other words, it excluded from the determination by the courts of the subject, which experience has shown in the great majority of instances, constitutes the only controverted question as respects its obligation.

II.

THE STATUTORY QUESTION NOT WITHIN THE POLICE POWER OF THE STATE.

The question with which we are here concerned was presented to the Supreme Court of Minnesota in *Hanna Piano Co. vs. Niagara Fire Ins. Co.*, *supra*. That case resulted in a reversal on grounds other than those involving the constitutional question. It was held, however, that the compulsory system of arbitration was not violative of the provisions of the Fourteenth Amendment, in respect either to (a) due process, (b) equal protection, or (c) liberty of contract.

In the opinion in that case the court stated as follows:

"Insurance is a business affected with public interest and by reason thereof must yield to governmental regulation. (Citing cases)

The contention that such compulsory arbitration is unconstitutional in contravention of the Fourteenth Amendment to the fundamental law and of Art. 1, Section 7, of the state constitution, is unsound. These constitutional provisions must yield to the police power, which is paramount."

Postulated of such reasoning, it is apparent that any conditions which the legislature of a state sees fit to impose on those engaged in the business of insurance are to be held constitutional and valid, regardless of their effect in operation and similarly regardless of whether such regulations have any reference to subjects ordinarily considered within the domain of the power of police.

It would necessarily follow that it was within the province of the legislature to devise any system or method it saw fit with respect to the subject of determining the liability of insurers in general. Furthermore, if the asserted power of police is without limitation in cases where the business at which it is ostensibly directed is of a public character, no constitutional safeguards would remain.

It is unnecessary to indulge in illustrations of the possible extent to which arbitrary legislative discretion might be extended upon any such broad and sweeping theory as that suggested by the court. Neither extended argument nor citation of authorities is required to refute any such doctrine.

Broadly stated, the rule is settled that to fall within the scope of police regulation, the statutory exercise of that power must address itself to the accomplishment of some-

thing concerning public welfare.

Thus it was stated in *Coppage v. Kansas*, [illegible] as follows:

"Now, it seems to us clear that a statutory [illegible] which is not a legitimate police regulation [illegible] made such by being placed in the same act with a [illegible] regulation, or by being enacted under a title [illegible] declares a purpose which would be a proper object for the exercise of that power. 'Its true character can not be changed by its collocation,' as Mr. Justice Grier said in the *Passenger Cases*, 7 How. 283, 458" (pp. 15-16).

And again:

"But, in our opinion, the Fourteenth Amendment debars the state from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights can not of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment" (pp. 18-19).

And again:

"But, when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state; and upon these matters this court can not, in the proper performance of its duty, yield its judgment to that of the state court" (p. 15).

differed from those in the cases last [illegible] that if arbitration of the claim were refused the claimant should be entitled to recover [illegible] fees in the event of suit. The statute was held unconstitutional.

Various expedients have been resorted to [illegible] tures of different states to avoid delays in the settlement claims against common carriers by the imposition of penalties. These cases are quite fully reviewed in *Chicago Ry. co. Nye, etc., Co.*, 260 U. S. 35, in which the limitations of the legislative authority are expounded.

It is unnecessary to consider the broader phases of legislation ostensibly directed at the compulsory arbitration of controversies. That no such power exists, is settled by

Wolff Co. vs. Industrial Court, 262 U. S. 522;

Dorchy vs. Kansas, 264 U. S. 286.

It is, of course, admitted that the business of insurance is affected with a public interest and therefore subject to state regulation in the exercise of the latter's legitimate power of police.

Northwestern, etc., Ins. Co. vs. Minn., 232 U. S. 516;

German Alliance Ins. Co. vs. Kansas, 233 U. S. 389;

National Ins. Co. vs. Woolsey, 256 U. S. 35.

The authorities are quite fully reviewed in the cases cited. In each instance where the exercise of the power has been sustained, with the exception of certain of the earlier authorities in which it was erroneously predicated upon unlimited control over foreign corporations, it has been directed at the correction of abuses and the prevention of the public welfare.

The statute with which we are here concerned cannot be assigned to the class thus indicated. There is a broad distinction between prescribing the form or terms of a contract and prescribing the methods by which the obligation of such contract may be enforced. A similar distinction may be made between the class of cases in which limitations on the effect of applications for insurance have been sustained and the right of interposing certain defenses, denied.

It will not do to ascribe a system of compulsory arbitration, committed to the jurisdiction of an extra-judicial tribunal, to the domain of remedial law. The latter obviously has reference to instances of judicial procedure. The system with which we are here concerned, on the contrary, is wholly foreign to anything pertaining to judicial procedure. No principle has been suggested and none occurs that justifies assigning denial of right of recourse to the courts, respecting an ordinary contractual obligation, to the field or domain of police power. The segregation of a single class of business of ordinary commercial character from all other classes with the imposition on the former of conditions depriving the right of judicial redress accorded the latter, presents a discrimination which contravenes both the due process and equal protection provisions of the fundamental law.

This branch of the discussion cannot be better concluded than by quoting the language of this court in *Gulf Colorado, etc. Ry. vs. Ellis*, 165 U. S. 150, as follows:

"It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or

equally with other debtors [illegible] courts as other litigants under like circumstances with like protection" (p. 153).

Again:

"While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of absolutely holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation, is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restricting state action" (p. 154).

Again:

"But a mere statute to compel the payment of debts does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation" (p. 158).

III.

As Applied to Appellant, the Exaction of Compliance With the Statutory Condition Was Tantamount to the Requirement of the Surrender of a Constitutional Right as the Condition of the Privilege of Doing Business Within the State.

The principle alluded to in the caption is so clearly established as to require nothing more than a brief reference

protection of people and corporations living under our institutions" (pp. 286, 287).

The principle was restated in *Frost vs. Railroad Commission*, 271 U. S. 583, as follows:

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. * * * If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel the surrender of all. It is inconceivable that guaranties inbedded in the Constitution of the United States may thus be manipulated out of existence" (pp. 593, 594).

In *Hanover Ins. Co. vs. Harding*, 272 U. S. 494, the effect of these decisions was sought to be qualified by the claim that where a corporation had voluntarily accepted and acted upon the provisions of the local law, its rights and obligations could be predicated of the voluntary contractual relation resulting. This contention was answered in the following statement:

> "One argument urged against our conclusion is that the relation of a foreign insurance company to the State which permits it to do business within its limits, *is contractual*, and that, *by coming into the State and engaging in business on the conditions imposed*, it waives all constitutional restrictions, and cannot object to a condition or law regulating its obligations, even though, as a statute operating *in invitum*, it may be in conflict

with constitutional limitations. [illegible] prevail in view of the decisions of this Court in [illegible] considered cases." (Italics ours.) (p. 612.)

The rule was restated in *United States ex. rel. [illegible] St. P. Ry.*, Adv. Op. 142 (51 Supr. Ct. Rep. 109), as follows:

"Broadly stated, the rule is that the right to [illegible] the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to [illegible] condition prescribed by the state which is void under the provisions of the Federal Constitution."

In considering the effect of the law with which we are dealing in the instant case, the salient fact, both from the jurisdictional and constitutional standpoints, is its effect or operation as applied to appellant.

Dahnke-Walker Co. vs. Bondurant, 257 U. S. 282.

As held in *Coppage vs. Kansas, supra*, in the excerpt already quoted, the decision does not depend upon the form of the law or its declared purpose. The test is found in its operation and effect as applied and enforced by the state, and with respect to these matters the judgment of the state court is not controlling.

The circumstance that the law in question is part of a regulatory system and may be superficially characterized as incidental is not determinative, for, as similarly stated in *Coppage vs. Kansas, supra*, in substance, if it is not a legitimate police regulation, it cannot be made such by the incorporation in the terms of an act which, in other respects, may be assigned to a proper exercise of the police power.

In so far as the law requires the insurer to submit the determination of the amount of its obligation or liability

prohibition without right of recourse to the courts, the subject must be approached and considered from the standpoint that this is something wholly collateral and independent of anything properly pertaining to the regulation of the business of insurance. The laws of the state, as far as we are presently concerned, make no exception in their requirements. These last must be accepted *in toto*, or, as the alternative, a corporation must refrain from carrying on business in the state.

The acceptance of the provisions from a practical standpoint may be regarded as involving a species of "duress."

In *Union Pacific Ry. Co. vs. Public Service Commission*, 248 U. S. 67, it was contended that the acceptance by a corporation of certain provisions of the law was tantamount to a waiver of constitutional rights and that any federal question was thereby excluded.

In reply to this contention, this court stated as follows:

> "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in *Atchison, Topeka & Santa Fe Ry. Co. vs. O'Connor*, 223 U. S. 280" (p. 70).

The terse and pointed statements of Mr. Justice Lamar in *German Alliance Ins. Co. vs. Kansas, supra*, and of Mr. Justice Holmes in *Block vs. Hirsch*, 256 U. S. 135, 157, to similar effect, were quoted in our "Statement of Jurisdiction" and need not be repeated.

As far as the local law is concerned in its resultant operation and effect, a quite anomalous situation is presented in view of the decision rendered by the Supreme Court of the

state in *St. Paul, etc., Ry. vs. Gardner*, 19 Minn. 132.

In that case, upon extended consideration of constitutional principles, it was held that the legislature was without authority to provide for a compulsory reference in common law actions by order of the court.

It is difficult to conceive the legal distinction between a statute assuming to confer such a power on the courts of the state and one which in substance confers a similar right on one of the parties to a controversy without the intervention of the court. Such however, is the natural and necessary effect of the statute with which we are here concerned, and, as already indicated, that statute cannot be sustained without denying, as respects the business of insurance, the ordinary rights which are recognized and inherent in all other lines of business in general, of recourse to the courts for the determination and settlement of all controverted obligations.

IV.

The Theory of Voluntary Contract Untenable.

The Supreme Court of Minnesota said in the Itasca Paper Company case, *supra*, as follows:

> "However the policy with the provision for the board of appraisal is a contract voluntarily made by the parties, notwithstanding the form is prescribed by the statute." 175 Minn. 71, 76.

This statement was made on the authority of a previous decision of the same court and precedents from other state decisions cited.

It will be noted, however, that the decision in the instant case, while citing that in the Itasca Paper Company, *makes no allusion to the theory of voluntary contract.* It is fairly

invisible the court saw that consistently with principle, the theory of voluntary contract could not be sustained—in other words, that lacking the statutory sanction and considered solely from the standpoint of contract, the scheme of compulsory arbitration would be ineffective.

For the immediate moment, the reasons for this apparent change of viewpoint may be postponed. It will suffice to quote the following language of the court:

> "The companies claim that an agreement for a common law arbitration is revocable, and therefore the policy provision is revocable, and they claim that by refusing to participate they revoked. This does not follow. *It was never the intent of the statute that the arbitration was other than compulsory*" (Rec., p. 89, Italics ours).

It is, of course, apparent that the conclusion of the state court with respect to the effect of a policy issued in form and terms made compulsory by its laws is not controlling on this court in the determination of the constitutional question. This is perhaps sufficiently indicated in the cases already reviewed.

It was plainly stated in the syllabus of *Ward vs. Love County*, 253 U. S. 17, as follows:

> "The jurisdiction of this court to review a judgment of a state court the effect of which is to deny a federal right, cannot be avoided by placing such judgment on non-federal grounds which are plainly untenable."

The opinion, which expounded the principle in more detail, added the following terse comment:

> "Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided" (p. 22).

It was stated *arguendo* in *Insurance Co. vs. Morse*, 20 Wall. 445, 450-451, that an agreement made with the state to the effect that property rights "should in all cases be submitted to arbitration," was void and unenforceable.

Similarly, in *Southern Pacific Co. vs. Denton*, *supra*, that a statute requiring a corporation, as a condition precedent to doing business within the state, to surrender constitutional rights—

> "Was unconstitutional and void and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."

It is difficult to perceive any logical ground for postulating a distinction between such agreements when made with the state and when made with citizens of the state under compulsion of the latter's requirements.

In this connection it may be observed that in its resultant effects, the circumstances that the statutory provision for arbitration was incorporated in the policy is of no moment. Under all laws of this class, the provision of the statutes are generally held interpolated on the policy contracts, whether set forth therein, or otherwise, and that provisions in the contract itself contravening the statutes are ineffective.

This rule was applied by the Supreme Court of Minnesota in *Heim vs. American Alliance Ins. Co.*, *supra*.

That it generally obtains will sufficiently appear from the following:

Whitefield vs. Aetna Ins. Co., 205 U. S. 189.
Equitable, etc., Society vs. Clemens, 140 U. S. 226.
Hancock, etc., Ins. Co. vs. Warren, 181 U. S. 73.
Hicks vs. British American, etc., Co., 162 N. Y. 201.

Bourgeois vs. Northwestern, etc., Ins. Co., 86 Wis. 606.
Gardner vs. Insurance Co., 163 N. C. 367.
Noem vs. Equitable, etc., Ins. Co., 35 So. Dak. 593.

The reason for the apparent abandonment in the instant case of the untenable theory of voluntary contract is made reasonably clear, if regard be had to the necessary consequences of that theory. Approaching the question from the standpoint of *the contract alone*, as must be done if the idea of the statutory sanction is to be excluded, the criterion must obviously have been found in the established rules of the common law.

The Minnesota court, as already shown, had uniformly held that the arbitration contemplated was, to all substantial intents and purposes, governed by common law rules. It necessarily followed that the incidental rights and obligations were to be tested on common law principles.

While some confusion manifests itself in the decisions of the different jurisdictions, the great weight of authority sustains the principle that executory agreements for arbitration fall broadly into two classes: In the first of these, the agreement contemplated the submission of the entire controversy to arbitration and was held ineffective on grounds of public policy as ousting the jurisdiction of the courts.

In the second, the agreement was limited to the determination of incidental elements not covering the entire subject-matter, thus not ousting the jurisdiction of the courts, and was accordingly held valid.

The great landmarks in insurance law expounding the distinction thus indicated are *Scott vs. Avery*, 5 H. L. Cas. 811, and *Hamilton vs. Insurance Co.*, decided by this court, 136 U. S. 242.

As applied to the first class it was generally said the

"agreement" for arbitration was revocable. In [illegible] class, that it was not. All that was meant by [illegible] in the succinct statement of Mr. Justice Brandeis in the *Cross Line vs. Atlantic Fruit Co.*, 264 U. S. 109, was that in the first class the agreement was invalid, while in the second it was valid.

Notwithstanding, it was settled at common law, as shown by the cases cited in the opinion last above, that a valid agreement for arbitration was not specifically enforceable and that the consequences of its breach or non-performance were limited to an action for damages.

As a result of the principles thus indicated, the English and American authorities uniformly held a submission to arbitration could be revoked at any time before award rendered.

The cases are collated in the note to *Williams vs. Branning Mfg. Co.*, 47 L. R. A. (N. S.) 337, 400, note XVIII.

The decisions in Minnesota recognize this rule:

Holdridge vs. Stowell, 39 Minn. 360.

Minneapolis, etc., Ry. vs. Cooper, 59 Minn. 290.

The authorities generally have applied the same rule in cases of arbitration under the common form of insurance policy contracts.

See *Harrison vs. Hartford Fire Ins. Co.*, 112 Ia. 77.

Nurney vs. Firemen's Fund Ins. Co., 63 Mich. 633.

Chippewa Lbr. Co. vs. Phenix Ins. Co., 80 Mich. 116.

Home Fire Ins. Co. vs. Kennedy, 47 Nebr. 138.

Franklin vs. New Hampshire Ins. Co., 70 N. H. 251.

People vs. Nash, 111 N. Y. 310.

Mentz vs. Armenia Fire Ins. Co., 79 Pa. 478.

Pepin vs. Societe, etc., 23 R. I. 81.

In the application of these principles, the only sanction [illegible] to the arbitration feature in insurance contracts was that making compliance, when properly demanded, a condition precedent to any action to recover the loss. Under the common law therefore, there was no way in which either party to an insurance contract could force the other into an arbitration against his will. Furthermore, a submission though made, was revocable by either party before the rendition of an award thereunder. The consequences were that in case the submission were revoked by the assured, the insurer could plead non-observance of the policy's requirement in abatement, in all cases where the terms of the policy either expressly or by necessary implication made an award a condition precedent to action brought.

See *Monnett vs. German American Ins. Co.*, 50 Minn. 341.

Revocation, on the other hand, on the part of the insurer, was tantamount to a waiver of the condition precedent and, in the almost innumerable cases in which such waiver was held to have existed, immediate action on the policy was permitted.

The relatively brief review of these features sufficiently shows the confusion of ideas indicated by the Supreme Court of Minnesota in its decision in the instant case.

The following statement in the opinion is illustrative:

"The claim is there made that the arbitration provision, if compulsory, ousts the jurisdiction of the court and therefore is invalid" (R. 88).

[illegible] is assigned to vivid imagination as no such [illegible] was ever made or dreamed of by counsel for appellant. What was contended for and sought to be enforced

[illegible] that the court [illegible]

If it excluded the compulsory effect of the statute [illegible] stand on the principles of the common law [illegible] the latter was assumed, the scheme of arbitration [illegible] effectual by reason of the fact that under [illegible] mon law principles it was not susceptible of [illegible] formance and was open to revocation at any time [illegible] award was rendered. That the latter conception [illegible] destructive of the statutory purpose is self-evident [illegible] plains, as already indicated, the apparent change [illegible] point of the court.

The concession in the opinion with respect to the [illegible] *pulsory purpose of the statutory requirement* excludes [illegible] course to the theory of voluntary contract.

Without this, whether considered from a practical or [illegible] standpoint, it is difficult to find so much as a plausible [illegible] gument to sustain the contention that a form of [illegible] made compulsory by law and with reference to the terms [illegible] which the law admits of no variation, is voluntary. The only option reserved is that of accepting the law's require[illegible] ments or going out of business. In the constitutional [illegible] there is nothing voluntary in these alternatives.

The situation, in principle, would not have been [illegible] ly dissimilar had the statute required the standard policy to include an agreement that the insurer would not remove any case or controversy arising thereunder into the Federal Courts.

We are unable to perceive any logical ground [illegible] which it may be claimed that the circumstance [illegible] waiver of constitutional rights is required to be [illegible] each policy issued, changes the situation from what [illegible] have been had the requirement been limited to a single [illegible]

action with the State which would necessarily have been incorporated on the policy by implication.

The result is a change of form but not of substance. The multiplication of the number of stipulations affecting the waiver can have no effect on the latter's validity.

V.

Miscellaneous in Conclusion.

The result of the statute and standard form of policy thereby prescribed, required that appellant and all other foreign insurance companies should waive the ordinary right of recourse to the courts with respect to the determination of the amount of their respective obligations and accept in lieu of such redress, the award of a non-judicial tribunal.

The resulting situation would have been wholly changed had the system devised provided for appeal or review by the courts of the decisions of the specially constituted tribunal thus created. The latter however, was not the fact.

McQuaid Market House vs. Insurance Co., supra.

Kaufman vs. Jewelry Co., 168 Minn. 431.

The various attempts of legislatures to create and accord finality to the decisions of specially constituted boards or bodies without the right of review or appeal to the courts has uniformly been held to contravene the Fourteenth Amendment as a denial of due process as well as the equal protection of the laws.

See *Ohio Valley Co. vs. Ben Avon Borough*, 253 U. S. 287, and cases cited.

The Supreme Court of Minnesota in the opinion under review as well as that in the Ithaca case emphasize the fact

that the award did not determine the [illegible]
As far as the questions with which we are here [illegible] concerned, this is little more than a play on words. [illegible] liability is, of course, determined, and determined [illegible] as far as the all important issue of amount of loss and [illegible] age is concerned. There may be other defenses available, such as the violation of conditions precedent or subsequent, but reconsideration of the single issue, which, in the great majority of cases, presents the only subject-matter of controversy, is precluded.

It is unnecessary to consider the resultant effect had appellant acceded to the demand for arbitration and participated in the proceedings thereof. In the instant case, appellant and the other insurers concerned neither appeared nor took any part in such proceeding; on the contrary, from the beginning have stood strictly on their legal rights, challenging the law prescribing the compulsory system.

We similarly have no concern with the question which would have arisen had the respondents established the amount of loss and damage, claimed to have been sustained, by competent proofs introduced at the trial independent of the award. Had this procedure been adopted, appellant would have had its day in court and the results have been held tantamount to an abandonment of the award and establishment of the obligation under the policies in the ordinary manner.

It has been heretofore contended that the legal system prescribed by the Minnesota Statutes is indiscriminately applicable to foreign and domestic insurance companies alike.

The answer to any such contention is found in the [illegible] statement of Chief Justice White in *Harrison vs. St. Louis, etc., Ry. Co.*, 232 U. S. 318, 332, as follows:

At once it is to be observed that the contention proceeds upon a self-evident misconception which is this, that if only wrong be indiscriminately done, it becomes rightful."

The circumstance that the prescribed system provides for the application to a court for the appointment of an umpire is of no moment. It is perfectly plain that the function exercised by the court in this regard is non-judicial. It rests upon nothing more tangible than the assumption the tribunal thus called upon will exercise impartiality in the appointment indicated.

From the standpoint of the principles with which we are here concerned, it is seemingly apparent that if the power to prescribe any such system resided in the legislature, the method of its exercise could not be called in question. The statute would have had precisely the same force and effect had the appointment been left to a justice of the peace or any other designated public functionary.

In the Itasca case, the Supreme Court of Minnesota indicated that the constitutional question was not available as a defense to an action brought on the award, adding that the situation did not present the alternative of accepting the law or going out of business as no one was bound to observe the requirements of an unconstitutional law.

Ludwig vs. Western Union Telegraph Co., 216 U. S. 146, was cited in support of the theory thus announced.

It should require no argument to demonstrate that if the law itself were unconstitutional, nothing done thereunder could be accorded legal validity or effect. On the assumption indicated, the arbitration would be a purely ex parte proceeding devoid of legal sanction on which no rights could be predicated in a judicial proceeding.

If it further be assumed that [illegible] cated in the Ludwig case was [illegible] follows that such remedy was exclusive [illegible] have recourse thereto was tantamount to a [illegible] tutional rights.

A complete answer to this contention is found in [illegible] *vs. Chicago, etc., Ry.*, 241 U. S. 533, 539.

It should require no argument to demonstrate that [illegible] particular scheme devised by the Minnesota law was [illegible] the constitutional power of the legislature of that [illegible] variety of different schemes affecting different lines of [illegible] dustry and endeavor and having the same ultimate [illegible] must be recognized as legal. Upon this theory, the [illegible] guards incorporated in the Fourteenth Amendment [illegible] be left to the mercy of arbitrary legislative discretion [illegible] become conspicuous for their non-observance rather than [illegible] their recognition.

It is therefore submitted that the judgment here appealed from was erroneous; that the statute of the state to which that judgment was referable and without which it could not have been rendered contravened the requirements of the Fourteenth Amendment in [illegible] various respects hereinabove more fully indicated, viz.: First—as requiring of appellant, as the condition of the privilege of doing business in Minnesota, the surrender of a right afforded by the Federal Constitution; second—as a denial of due process of law; third—as a denial of the equal protection of the law; and fourth—the denial of the ordinary right of contract.

That as far as the assumed exercise of the power of [illegible] is concerned, no principle sustains any such assumption of that power; that no real objective [illegible] lation to that power, can be assigned to the law. [illegible]

nothing more than a futile gesture on the part of the legislature and a lame attempt to deny in certain classes of cases, and as to certain corporations, the ordinary right of recourse to the courts.

The judgment should accordingly be reversed.

Respectfully submitted,

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

Number 4

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN,

Appellant,

vs.

THE GLIDDEN COMPANY, ET AL.,

Appellees.

BRIEF FOR APPELLEE ON JURISDICTION.

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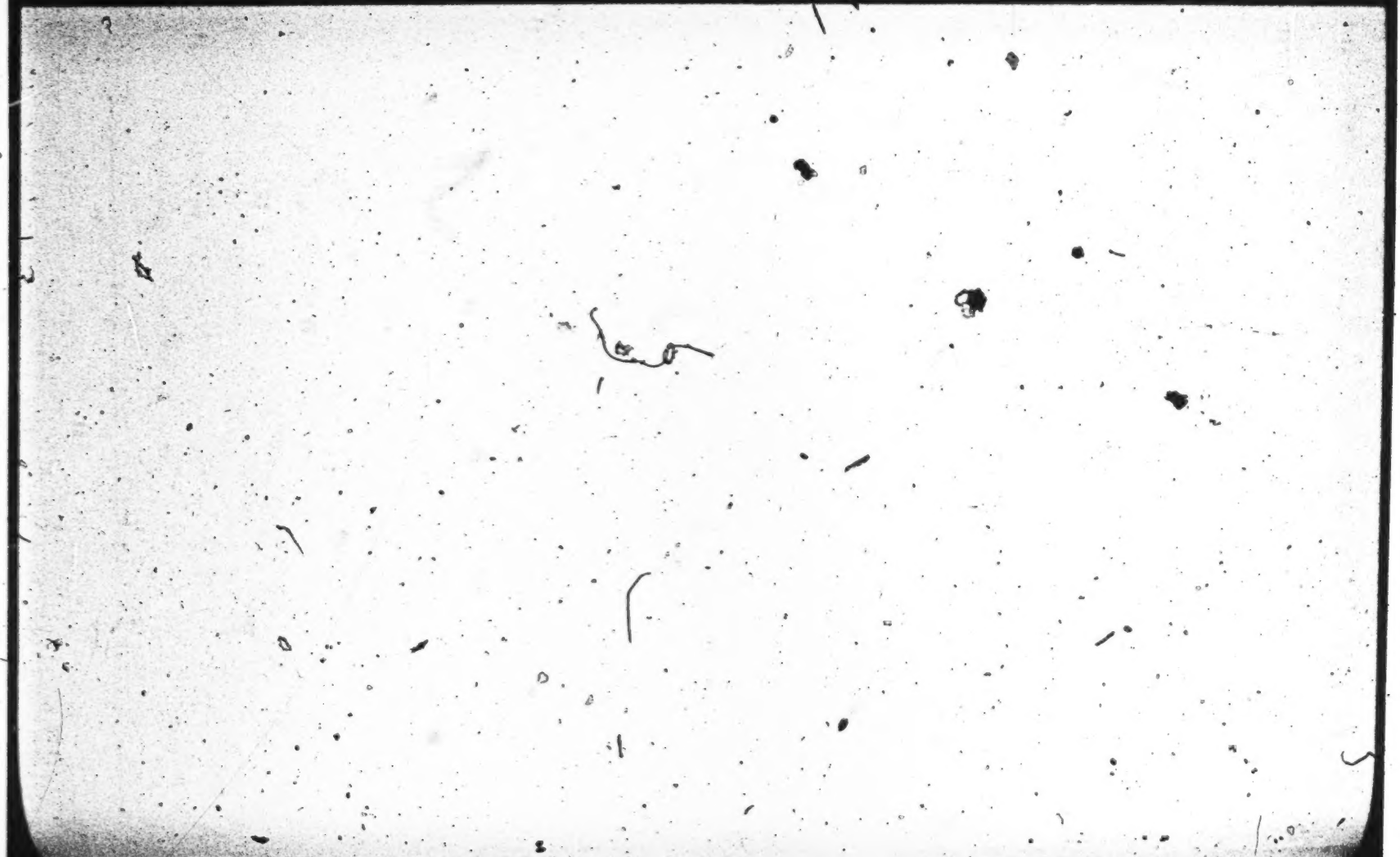

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MOTION.

And now come the Respondents in the above entitled action, and respectfully move this Honorable Court for an order:

1. Dismissing the appeal herein on the ground and for the reason that the decision is based upon a non-federal ground which is independent of the federal question decided, and is broad enough to sustain the judgment of the State Court.

2. In the alternative, affirming the judgment of the lower Court on the ground and for the reason that it is manifest that the appeal was taken for delay only, and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, and, having already been decided by this Court, are res adjudicata and are no longer open questions in this Court.

STATEMENT OF FACTS.

The Siegel Hardware Company sustained a fire loss on March 9, 1929. It was then insured by the Appellant, and by other mutual insurance companies. It subsequently assigned its chose of action to the Respondents.

The parties were unable to agree upon the loss, and proper proceedings for arbitration were instituted by the insured, which resulted in the appointment of an umpire by the State District Court. The appraiser appointed by the insured and the umpire appointed by the Court, after due notice to the Insurance Companies on the risk, made an award of $74,964.91.

The Appellant and the other Companies did not appear or participate in the arbitration proceedings, *but neither did they affirmatively object thereto.*

Thereafter suit was commenced to recover upon the award. Verdict and judgment was given and rendered to the Respondents. Appeal was thereupon perfected, and the Supreme Court of the State of Minnesota upheld the award and the constitutionality of the statute on which it was predicated.

Glidden Co. v. Hardware Co., 233 N. W. 310.

This appeal is from the final judgment so rendered by the Supreme Court of Minnesota.

There are three companies upon the risk, i. e. The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, Retail Hardware Mutual Fire Insurance Company of Minnesota, and the Minnesota Implement Fire Insurance Company of Minnesota. The last two companies are Minnesota corporations. The immediate Appellant is a Wisconsin corporation, authorized to and actually transacting business in Minnesota.

ARGUMENT.

FIRST

DISMISSAL OF APPEAL.

The decision of the Minnesota Supreme Court is based upon two grounds, one federal and the other non-federal. The non-federal ground of the decision is that a policy like the one here involved, with a provision for a board of appraisal, is a contract voluntarily made by the parties, notwithstanding the form is prescribed by the statute. This is the law of the State as established by the Supreme Court of Minnesota in

Itasca Paper Co. v. Niagara Fire Ins. Co., 175 Minn. 73.

The United States Circuit Court of Appeals of the Eighth Circuit has also adopted this position:

Continental Ins. Co. v. Titcomb, 7 Fed. 2nd 833.

Orient Ins. Co. v. Skellet, 28 Fed. 2nd 968.

The decision in the Itasca Paper Company case, supra, is made the basis of the decision by the Court in the case at bar, where the Court said:

"It is conceded substantially that the recent case of Itasca Paper Co. v. Niagara Fire Ins. Co., 175 Minn. 73, 220 N. W. 425, if applied, controls. The defendants urge that certain late federal cases have changed the doctrine there approved. They ask a reconsideration of the questions involved with the purpose, if unsuccessful here, of having a review in the court of final authority. After a thorough reconsideration, we follow the Itasca case. An extended further discussion is not necessary."

Glidden Co. v. Hardware Co., 233 N. W. 310.

This non-federal ground for the decision is independent of the federal ground, and is broad enough to sustain the decision. The judgment, then, does not depend on the decision of any federal question, even though such federal question was also decided.

Accordingly the appeal should be dismissed.

Enterprise Irrigation Co. v. Canal Co., 243 U. S. 157, 164.

This non-federal ground is based upon fair and substantial support, and shows on its face that it is not advanced to escape a review of the federal question. The non-federal question is independent of the federal question, and is broad enough to sustain the decision, and it shows conclusively that it is not essentially arbitrary, or a mere device to prevent review.

McCoy v. Shaw, 277 U. S. 302.

The history of this legislation covering this compulsory arbitration, and the long continued acquiescence therein by the Insurance Companies, as hereinafter recited, furnishes a far stronger argument for the voluntary nature of this contract than did the freight schedules involved in the following case:

Mpls. S. Paul & Sault Ste. Marie Ry. Co. v. Washburn Co., 254 U. S. 370.

Nor is the voluntary nature of this contract destroyed by the compulsory arbitration provision of the statute, as the Appellant, as hereinafter set forth, was not compelled to observe an unconstitutional law but had ample means at its disposal to protect its interests in the manner hereinafter set forth.

Itasca Paper Co. v. Niagara Fire Ins. Co., supra.

Ludwig v. Western Union Tel. Co., 216 U. S. 146.

The following language in the case of

Mpls. Ry., etc., Co. v. Washburn Co., supra,

is peculiarly appropriate and applicable to the present situation:

> "Manifestly, if shippers cannot rely upon the rates as so published and filed, the requirement of such publication becomes a mere trap for the unwary."

It is fair to assume that these companies have solicited business and taken large amounts of money as premiums from Minnesota citizens under contracts whereby these citizens had every right to, and did believe that they were entitled to arbitrate their losses, if they saw fit so to do, and it is not unfair to assume that, when these companies solicited business, and submitted their policy contracts to their insured, the latter had every right to believe that these contracts, prepared and submitted by the companies, meant exactly what they said.

If the arbitration clause was as objectionable to the Insurance Companies as they now profess it to be, they could have raised the question of its constitutionality long ago by a test case, or by refusing to comply with the Act, and then restraining the State officials from revoking their license, or by other means not involving the penalizing of their own insured, with whom they had contracted for arbitration, and from whom they had taken money in reliance thereon.

SECOND.

Affirmance of Judgment.

Respondents respectfully contend that if the appeal be not dismissed the judgment should be affirmed, because the constitutional question presented is not, and was not at the time of the granting of the writ, substantial in character, and the question has been settled and is no longer an open one in this Court.

Such a situation justifies an affirmance.

Zucht v. King, 67 L. Ed. 194.

Milheim v. Moffat Dist. 67 L. Ed. 1194.

Roe v. Kansas, 73 L. Ed. 259.

Davis v. Teague, 74 L. Ed. 1123.

Hodges v. Snyder, 43 Sup. Ct. 435.

Mpls. &c. Ry. Co. v. Merritt Co., 254 U. S. 376.

Legislation establishing the statutory form of fire insurance policies in Minnesota, and containing the arbitration clause, was originally enacted in 1895.

Minnesota Gen. Laws 1895, Chap. 175, Sec. 53.

Therein it provided, amongst other things:

> "The award * * * shall be conclusive and final upon the parties as to the amount of loss or damage * * * and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

This "arbitration provision" was carried forward, with an unimportant change of a word, until 1913, when the present law was enacted.

Gen. Laws 1913, Chap. 421.

Mason's Minnesota Statutes 1927, Sec. 3512.

This standard form, of course, is applicable, not only to foreign insurance companies, but to domestic companies as well. There is no discrimination and no denial of the equal protection of the laws.

It is interesting to note that prior to 1913, the arbitration was compulsory, so far as the insured was concerned. If demanded and not complied with, the insured was remedyless.

Furthermore, the award "was conclusive and final upon the parties as to the amount of loss and damage."

The amendment was made so as to give equal rights to both the insured and the insurer.

The companies contented themselves with complying with this provision and taking advantage thereof, without any objection or criticism, until 1927,

Abramowitz v. Ins. Co., 170 Minn. 215.

In 1928, so far as we can ascertain, the law was first directly attacked as unconstitutional.

Itasca Co. v. Ins. Co., 175 Minn. 73.

The Companies here involved continued to operate without objection until the instant case, nor did they AFFIRMATIVELY object to the arbitration until a sizable award proved to be the result thereof.

The gravamen of the objection to the statute, as raised by the Appellant, is that it denies the right of ordinary redress in the courts and is therefore unconstitutional (see page 6 of Appellant's brief).

That the argument of deprivation of redress in the courts is unsound has been determined by this Court, and is res adjudicata,

Hamilton v. Ins. Co., 136 U. S. 242; 34 L. Ed. 419.

Hamilton v. Ins. Co., 137 U. S. 370.

Red Cross Co. v. Atlantic Co., 264 U. S. 109; 68 L. Ed. 582.

This doctrine has been established since 1856.

Scott v. Avery, 5 H. L. Cases 811,

and as early as 1890 in Minnesota.

Gasser v. Ins. Co., 42 Minn. 315.

It has been uniformly upheld in the higher courts of England, Canada and the United States, and has thus become settled law in these countries, upon which the citizens thereof have a right to rely.

The provision of arbitration of insurance losses was in common use in policies voluntarily entered into many years before arbitration was embodied in statutory form. Statutory provisions compelling arbitration by one or both of the contracting parties are merely declaratory of what had become established usage and custom.

Many, if not most of the states have adopted a standard form of policy, incorporating therein compulsory arbitration in one form or another. The fact that arbitration is made compulsory as to the insured, by making it a condition precedent to recovery under the policy, could not make the statute less objectionable than it would be where arbitration is compelled as to both parties, as in Minnesota.

Incidentally, the United States Circuit Court of Appeals of the Eighth Circuit has upheld the Minnesota Statute.

Continental Ins. Co. v. Titcomb, 7 Fed. 2nd 833.
Orient Ins. Co. v. Skellet, 28 Fed. 2nd 968.

The Minnesota Supreme Court has held that the arbitration provision of the statute does not oust the jurisdiction of the Court.

Abramowitz v. Ins. Co., 170 Minn. 215.
Itasca Co. v. Ins. Co., 175 Minn. 73.
Glidden Co. v. Ins. Co., 233 N. W. 310.

The award itself, as distinguished from defenses other than amount of loss, may be set aside for fraud, lack of proper notice of hearing by the appraisers, etc., and it may be so grossly

excessive or inadequate as to be subject to revocation as for fraud THOUGH THERE BE NO ACTUAL FRAUD.

Harrington v. Ins. Co., 179 Minn. 510.

These decisions give the Appellant the right of asserting any defense in Court, except the question of amount of loss, and even in that particular it is not entirely foreclosed.

This Court has held on many occasions that the business of insurance is affected with a public interest, and by reason thereof must yield to public regulation.

German Ins. Co. v. Lewis, 233 U. S. 389, 58 L. Ed. 1011.

National Union Ins. Co. v. Wanberg, 260 U. S. 71, 67 L. Ed. 136.

Also, that the states have a right to prescribe standard forms of fire insurance policies, as being a valid exercise of their police power.

German Ins. Co. v. Lewis (supra).

We earnestly contend that the basic question involved has already been decided by this Court against the Appellant's contentions (Hamilton v. Ins. Co., supra) and that it is therefore res adjudicata, and accordingly that the appeal does not involve a substantial question.

The Hamilton case is decisive of the question because, although the contract there involved was not compulsory as to the insurance company, *it was compulsory as to the insured*, and he was the one who was attacking it and claiming its invalidity. This Court held that the compulsory arbitration, so far as the plaintiff was concerned, was a valid provision. It then would be eqully vald if compulsory as to both parties.

The following language of this Court leaves no vestige of doubt in the matter.

"Such a stipulation not ousting the jurisdiction of the Court * * * is unquestionably valid."

The Appellant's claim is that the Act is unconstitutional because it "denies them the right of ordinary redress in the Courts".

THIS COURT HOLDS OTHERWISE.

If a voluntary contract of arbitration is valid, and does not deprive the contracting parties of their property without due process of law, upon what theory is a statute void which compels such a contract when the general right of a state legislature to prescribe a standard form is admitted?

In closing, we submit that the fact that the statute has been applied and has been incorporated in thousands of policies, under which policyholders have paid thousand of dollars for a long period, should have a strong bearing upon determining the validity of the statute.

Swigart v. Baker, 229 U. S. 187, 57 L. Ed. 1143.
Blanset v. Cardin, 256 U. S. 319, 65 L. Ed. 950.
Iron Mt. Co. v. Alexander, 37 Fed. 2nd, 231.

Respectfully submitted,

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Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

STATEMENT.

The statement of facts herein by the Appellant, and the history of the case, call for no further statement or recital from the Appellees.

The federal question involved goes to the right of the state to adopt a statutory form of insurance policy, including the provision for compulsory appraisal of the amount of the loss.

The non-federal ground of the decision has been pointed out in the Appellees' brief to the jurisdiction, and goes to the question of voluntary contract.

ARGUMENT.

We advance these two propositions:

First: That the state has the right, in the exercise of its police power, to prescribe a standard form of fire insurance policy, and require that there be incorporated therein a compulsory arbitration provision determining the amount of the loss.

Second: The contract here in question was the voluntary contract of the parties, without regard to statute.

I.

COMPULSORY APPRAISAL OF THE AMOUNT OF LOSS IS WITHIN THE POLICE POWER OF THE STATE.

The Minnesota statute providing for the standard form of fire insurance policy is set out in full in Appellant's brief. The four distinguishing characteristics of the statute are:

1. The form of policy is compulsory.
2. The amount of the loss in case of disagreement shall be determined by appraisers.
3. The appraisal shall be binding and conclusive upon the parties.
4. The award is a condition precedent to the bringing of an action upon the policy.

Contrary to the contention of counsel, this Minnesota form of standard policy is not peculiar to this state, but it is identical in substance with the standard form in use in many, if not most of the states of the Union. The compulsory use of the prescribed form, the appraisal in case of disagreement, the binding effect of the appraisal, and the award being a condition

precedent to action, are common to most of the states. This provision making the award a condition precedent to action takes many different forms, but the effect is the same in all. There are a few states in which the award is not a condition precedent, and one or two states in which the appraisal is prima facie and not conclusive, but in a large majority of the states the standard form is compulsory, the appraisal in case of disagreement is compulsory unless waived, and is binding when made and is a condition precedent.

Counsel's contention that the Minnesota provision for appraisal is distinct from that of other states is not borne out by an examination of their statutes, as nearly all provide that in case of a disagreement, either party may demand an appraisal and, upon such demand, each shall name an appraiser who, in turn, shall select the umpire. As illustrative see:

Mich. Compiled Laws, 1929—Standard fire policy;
Pa. Cumulative Statutes 1928, Sec. 12490-B-523;
West Va. New Code of 1931, P. 897—Standard fire policy;
Maine Code of 1930—Standard fire policy.

* * * * *

Let us assume, for the purpose of argument, that the construction placed upon this statute by the Supreme Court of the State of Minnesota goes a step beyond the construction that the Courts of other states have placed upon similar statutes. Then the only difference between the Minnesota statute and the statutes of other states would be to compel the insurer to submit to an arbitration of the loss, as well as the insured.

It must be conceded that, since early times, the insured has been compelled to submit to arbitration as to the amount of the loss, as a condition precedent to an action on the policy. It cannot be that the constitutional rights of the insured are

of less importance in the eyes of the law than the constitutional rights of the insurer. They must be held to have equal rights under the law.

In spite of this fact, we find no case where the insured has been declared to have been deprived of his constitutional rights. Such a theory would have a stronger basis, both in law and logic, on the ground that it would deprive the insured of the equal protection of the law, than the theory advanced by counsel in this case. The long acquiescence in this provision by the insured is in itself a powerful argument for its reasonableness and validity, as applied to both insurer and insured.

While there may be a difference in the wording, the only difference in substance between the Minnesota standard policy and that of a majority of the other states, (and that difference is not material here) is in the interpretation put upon the Minnesota statute by the Minnesota Supreme Court, in the late case of

Abramovitz v. Continental Ins. Co., 170 Minn. 215, 212 N. W. 449,

to the effect that, in case the insurer refuses to appoint an appraiser, the Court may appoint an umpire, and that one appraiser and the umpire shall make the appraisal.

We do not find that the Courts of any of the other states have ever based upon this proposition, although the language of the Minnesota statute, upon which this interpretation is based, is not substantially different from the language of the statutes of many of the states.

[illegible] statute requires that, upon the demand of either [illegible] appraisal shall be had, and an appraiser shall be [illegible] by both the insured and insurer, it is not material [illegible] whether the refusal of the insurer to comply with the statute and appoint an appraiser is a

waiver of the right to an appraisal, or whether it gives the right to go ahead and have an award made by the remaining appraiser and the umpire. Surely, the insurer has no greater right to be relieved from the compulsory effect which the appraisal requires than has the insured, nor has a foreign corporation any greater right to freedom from a compulsory appraisal than a domestic insurance corporation, nor than the insured himself.

The Supreme Court of the State of Minnesota has interpreted the standard policy, not as a common law arbitration, as contended by counsel, but merely in the nature of a common law arbitration as distinguished from a statutory arbitration, but has specifically limited it to the determination of the amount of the loss, leaving all questions of general liability to judicial decision, confining the arbitration to determining the amount of the loss, and making it a condition precedent to the cause of action.

Glidden Co. et al. v. Retail Mut. Fire Ins. Co. of Minn., 223 N. W. 310.

This limiting of the appraisal to the amount of the loss, without in any way determining the liability of the insurance Company, distinguishes the case at bar from the cases cited by counsel on pages 20 and 21 of Appellant's brief.

The Minnesota Supreme Court has also held that the policy is construed as giving both insured and insurer the right of an appraisal, and that it does not deprive the Courts of jurisdiction.

Itasca Paper Co. v. Niagara Fire Ins. Co., 173 Minn. 73, 220 N. W. 426.

The extent to which the Court has jurisdiction is set forth in the case of

Harrington v. Agricultural Ins. Co. of Watertown, N. Y., 179 Minn. 510, 229 N. W. 792.

"But where such an award is so grossly inadequate or excessive as to be in effect a fraud, it may be vacated * * * as where the referees had no proper appreciation of the kind of property with which they were dealing, or of the damage done it. For such reasons alone, an award may be so grossly inadequate or excessive as to be the equivalent of fraud. * * Furthermore, although the appraisers of a fire loss must determine what property was covered in order to arrive at the amount of damage, the right of the insurer to have a judicial determination of liability includes the right to a judicial determination of the coverage of the policy."

This brings us down to the crucial question.

Is such a statutory provision in the standard fire insurance policy so unreasonable as to be beyond the police power of the state, and unconstitutional as denying to the appellant due process of law, the equal protection of the law, liberty of contract, and violative of the provisions of the fourteenth amendment of the Constitution of the United States in requiring a foreign insurance corporation to submit to it as a condition of doing business in the State of Minnesota?

Appellant claims that the law is unconstitutional on all of these grounds, and bases his contention upon the proposition—

First: That an insurance corporation is no different from a corporation engaged in an ordinary commercial enterprise.

Second: That the police power of the state has the same limitations as to an insurance corporation as to any other foreign corporation.

Third: That there can be no distinction between compulsory appraisal of the amount due on the policy and any other condition the state may seek to impose, such as limiting appeal to the Federal Court.

Fourth: That the public welfare is not promoted by compulsory appraisal of damages.

Counsel is compelled to admit that the decisions of this Court establish the doctrine that the insurance business is affected by the public interest, and, therefore, subject to state regulation, but seeks to limit this to the correction of some evil.

That counsel's analogy between an insurance corporation and a corporation engaged in ordinary mercantile business is a false one has been demonstrated again and again by the decisions of this Court.

While doubtless there could be a state statute that might go beyond the limits of reasonable public policy, no such case has ever come before this Court, but in every instance the regulation of the insurance business, by state statute has been upheld by the Court. This would not include a state statute discriminating against a foreign corporation engaged in the insurance business as against a local corporation, as in the imposition of a different measure of taxation between the foreign corporation and a domestic one, or a statute prohibiting removal by a foreign corporation of cases to the Federal Courts.

While the limits of such state regulation can only be marked out as the cases arise, the Courts so far have held valid state statutes, limiting the amount of new business; requiring the local investment of a certain percentage of reserves; regulating the premium rates; forbidding combination as to rates, commissions or manner of transacting business; the requirement of license; a provision that no misrepresentation in obtaining

a life insurance policy shall be material, unless actually contributing to the contingencies on which the policy becomes due; valued policy acts; acts providing standard forms; liquidated claim for the full amount of the policy in case of total loss; requirement of payment of damages or attorney's fees in case of delay in payment; requiring designation of State Insurance Commissioner as agent for accepting service; limitation of dividends; the publishing of accounts; requiring deposit in money or bonds; confining the business to corporations; limitation of risk; restriction of defenses to actions brought on policies; unearned premium reserves; provision that policies of hail insurance shall take effect within twenty-four hours from application, unless notice given to the contrary; requiring incorporation in contracts of insurance against liability for injury by operation of automobile of a provision subrogating the injured person to the rights of the insured in case of insolvency.

12 C. J. Sec. 898;
German Alliance Ins. Co. v. Hale, 219 U. S. 307;
N. W. Nat. Life Ins. Co. v. Riggs, 203 U. S. 241;
Nat. Union Fire Ins. Co. v. Wanberg, 260 U. S. 71;
Orient Ins. Co. v. Daggs, 172 U. S. 557;
Whitfield v. Aetna Ins. Co., 205 U. S. 489;
German Alliance Ins. Co. v. Lewis, 233 U. S. 389;
Farmers & Merchants Ins. Co. v. Dobney, 189 U. S. 300;
John Hancock Mut. Life Ins. Co. v. Warren, 181 U. S. 73;
Fidelity Mutual Life Ins. Co. v. Mettler, 186 U. S. 308;
Tyson & Bro. v. Banton, 273 U. S. 418, 436, 437;
Merchants Mut. Auto. Liability Ins. Co. v. Smart, 267 U. S. 126.

The extent of the police power of the state over corporations engaged in insurance and corporations engaged in ordinary

business is most carefully differentiated, and the reason for such broad control over insurance companies is distinctly pointed out in the recent decision of this Court in the case of

Tyson & Bro. v. Banton, 273 U. S. 418, 437,

and the Court there uttered a warning against invoking decisions upon statutes regulating insurance companies as precedents for the determination of cases involving corporations doing other kinds of business.

This brings us to the next proposition.

Is a compulsory provision requiring the appointment of appraisers to fix the amount of loss in case of disagreement a reasonable regulation, and one that contributes to the public welfare?

Long before the standard form of policy was required by statute in any of the states, the provision for the appraisal of the loss was a common one in insurance policies.

This Court, in the case of

Red Cross Line v. Atl. Fruit Co., 264 U. S. 108,

points out that the submission of maritime controversies to arbitration has long been common practice, going back to the eighteenth century. It was not, however, until the well known English case of

Scott v. Avery, 5 House of Lords, 811-854,

decided more than seventy-five years ago, that such a provision for appraisal was upheld as a legal one, and from that time to the present, such provisions for arbitration or appraisal have been of almost universal acceptance and use in all forms of fire insurance policies, until today there is scarcely a state in the Union that does not provide for such requirement by statute, and the same provision is carried out in the statutes of all

the provinces of Canada, and by the law of England and Scotland.

It is interesting and important to note that this provision for appraisal of the loss in fire insurance policies was thus the result of voluntary contract long before it was made compulsory by statute, and the statutory standard policy, as now used in Minnesota and most other states, is merely the adoption by statute of the form in common use at that time. Its use in the United States doubtless was extended and encouraged by the decision of this Court in the case of

Hamilton v. Ins. Co., 136 U. S. 242, 34 L. ed. 419,

in which Justice Gray, in commenting upon the provisions of the policy, which required the insured to submit to arbitration, said:

> "Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a *reasonable* method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country."

See also

Hamilton v. Ins. Co., 137 U. S. 370;

Red Cross Line v. Atl. Fruit Co., 264 U. S. 109, 68 L. ed. 582.

It would be a strange development of the law if a provision, voluntarily inserted in policies of insurance for nearly a century, for the appraisal of the amount of loss should, when required by statute to be put into all insurance policies, be held to be an unreasonable limitation upon the constitutional rights of the insurer or the insured.

It would not be an unnatural presumption to assume that a provision, put in a contract between an individual and an in-

surance corporation, substituting appraisers in place of a jury to determine the amount of loss, was primarily for the protection of the insurance company, and this is further emphasized by the history of this legislation in the State of Minnesota, where, in the first instance, the appraisal was made binding only upon the insured, and not upon the insurance company. It would seem strange that a procedure which has stood the practical test of a century of common usage in fire insurance policies, should at this late date prove to be an unreasonable limitation of the constitutional rights of the insurance company. Not only has the voluntary provision for arbitration of policies of insurance been upheld by this Court, and all of the American and English Courts, but the statutory requirement of the inclusion of this provision of appraisal in the standard policy has been upheld by every state and Federal Court that has passed upon the question.

Orient Ins. Co. v. Skellet Co., 28 Fed. (N. S.) 968;
Itasca Paper Co. v. Niagara Fire Ins. Co., 175 Minn. 73;
Glidden Co. et al. v. Retail Hdwe. Mut. Fire Ins. Co., 233 N. W. 310;
Opinion to the Maine Senate, 97 Me. 590;
Continental Life Ins. Co. v. Hattabough, 21 Ida. 285; 121 Pac. 81;
See also Coolidge Briefs on Ins., 2nd ed., Vol. 7, page 6135;
Grady v. Home Fire & Marine Ins. Co., 27 R. I. 145-62 Atl. 173;
Continental Fire Ins. Co. of N. Y. v. Titcomb, 7 Fed. (2nd) Series, 883.

Arbitration as a method of settling disputes has at all times been favored by the Courts of this country, so long as they do not deprive the Court of jurisdiction, and counsel for appellant

does not claim that this provision in the case at bar is invalidated for that reason.

Burchell v. Marsh, 17 How. 344-15 L. ed. 96,
and also the compilation of cases appearing in
47 L. R. A. N. S., page 342.

It will be apparent to the Court from the history of the development of the boards of appraisal that the parties themselves, long before the enactment of statutes making compulsory such appraisal of the amount of loss, had found it necessary to voluntarily incorporate such provision in fire insurance policies. The reason for this was also apparent, as it is a matter of common knowledge that the determination of the losses to property can be more readily and accurately determined by an examination of the property itself, rather than by establishing the loss by evidence produced before a Court or jury.

The Court can take judicial notice of the fact that fire insurance policies are written which cover vast stocks of merchandise, as well as buildings, where tremendous difficulty is encountered in determining the exact amount of the loss. If the insured, as well as the insurer, were compelled, in case of dispute, to wait until the controversy came on for trial before a Court or jury, it would be necessary for the property to be held in status quo, in order to properly present the evidence to the Court or jury, occasioning great inconvenience and further loss upon the insured, as well as upon the insurer. The expense and inconvenience of bringing in the articles of merchandise which might be damaged and showing them to a jury demonstrates the necessity of an arbitration provision such as the one in question. The impossibility of a jury or a Court being taken to the place where the loss occurred, whether it be a building or a stock of merchandise, is evident to the Court. In order to

accurately determine the loss it may be, and often is, necessary to make an examination of the books of the insured, to determine the amount of merchandise that the insured had on hand at the time of the loss.

It is evident to the Court that in a great many, if not most of the cases where loss occurs, the damage must necessarily be determined by experts, who, in order to determine this question, must make a very minute and exhaustive examination of the property damaged by the fire. That the use of men with peculiar qualifications for such determination is common in everyday business is a well known fact. A building contract leaves the estimates and measurements to the architect; the excavation contract to the engineer; the lumber contract to the scaler, and in every case his determination of the amount is very often made binding and conclusive upon the parties, except for fraud or gross mistake. Such customs grew up from the very necessities of business, and the use of appraisers in fixing the amount of insurance losses has had the same origin in the necessity of the case, and its extension has been even greater than in those other forms of human endeavor.

More than forty years ago Justice Vanderburgh, of the Supreme Court of Minnesota, recognized this necessity when he said:

> "It is eminently proper that in such cases, involving the examination of books, and a large number of items, and the extent of the damage, it shall be determined by three men as appraisers. It is a matter proper for reference, and the controversy may generally be more satisfactorily and speedily determined in that way than in any other."

See Gasser v. Sun Fire Office, 42 Minn. 315, 319, 320;
Mintz v. Armenian Ins. Co., 79 Pa. 481;
Johnson v. American Fire Ins. Co., 41 Minn. 396.

If years of experience have proven that such a method of determination of the amount of a fire loss is more satisfactory, and results in a more speedy determination than by the verdict of a jury, then it cannot be said to be an unreasonable provision for insertion in the statutory standard policy.

The use of the appraisal as a manner of determining the amount of loss in case of fire has the sanction of one hundred years of voluntary business use. It has existed for nearly half a century in the statutory provisions of the standard policy in a large number of the states of the Union. Not only have the insurer and the insured found it a practical, satisfactory and speedy remedy, but the legislatures of the various states have, without exception, adopted it as a matter of state policy. The legislatures must have considered the difficulties of submitting such a determination to a jury, and must have been moved by the delays and losses and expense that would be incurred thereby, and the legislature is the judge of the method to be pursued to attain the end sought in the public welfare, so long as they violate no rights of citizens.

The language of Justice McKenna, in the case of

German Alliance Co. v. Lewis, 233 U. S. 387, 412,

has peculiar application to the situation in the case at bar, in the light of the long, voluntary acceptance of the use of this method of appraisal of the damage in case of fire, and the embodying of the same into statute by the law-making bodies of all English speaking peoples. The Court said:

> "Those regulations exhibit it to be the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence

saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis."

We submit that the power of the legislature to make compulsory the use of the appraisal in the standard fire insurance policy is not open to serious dispute, and whether this comes under the police power, as is generally contended, or under the power to regulate corporations, domestic and foreign, as is sometimes contended, is not material.

New York Life Ins. Co. v. Horbison, 199 Mass. 190, 199.

No serious contention can be made here that this statutory provision is violative of the fourteenth amendment, upon the ground of a discrimination against the rights of a foreign corporation. The standard policy is required of both a domestic and a foreign corporation, and no distinction is made between the two.

In the case at bar, two of the insurance companies are Minnesota corporations, and appellant, the third defendant, is a Wisconsin corporation, but the standard form was required equally of all three.

This Court, in the Riggs case, upheld a statute prohibiting a foreign insurance corporation from setting up a misrepresentation, not contributing to the death of the insured, as a defense to an action on its policy, and pointed out that, if the statute there in question was not invalid as to life insurance companies of Missouri, the state was not prohibited from making its provision applicable to corporations of other states doing business in its territory, with its sanction or under its license.

The Court said:

"Now, if the statute in question is not invalid as to life insurance corporations of Missouri, it is not perceived that

the state may not make its provisions applicable to corporations of other states doing business in its territory with its sanction or under its license. That Missouri could forbid life insurance companies of other states from doing any business whatever within its limits, except upon the terms prescribed by the statute in question, cannot be doubted, in view of the decisions of this court. If it could go that far, why may it not declare, as it has in effect done, by this statute, that its provisions shall apply to foreign life insurance companies doing business in Missouri under its license? It would, indeed, be extraordinary if the state could compel its own life insurance companies to respect this statute, but could not enforce its provisions against a foreign corporation doing business within its limits, with its consent, express or implied—especially against one which, as is the case here, came into the state for purposes of business after such statutory provisions were enacted. As the present statute is applicable alike to all life insurance companies doing business in Missouri, after its enactment, there is no reason for saying that it denies equal protection of the laws. Equally without foundation is the contention that the statute, if enforced, will be inconsistent with the liberty guaranteed by the 14th Amendment. The liberty referred to in that Amendment is the liberty of natural, not artificial, persons. Nor, in any true constitutional sense, does the Missouri statute deprive life insurance companies doing business in that state of a right of property. This is too plain for discussion."

N. W. Nat. Life Ins. Co. v. Riggs, 203 U. S. 243.

This entire absence of any discrimination between a foreign and a domestic insurance company distinguishes the statute in the case at bar from the case cited by counsel of

Hanover Fire Ins. Co., 272 U. S. 494,

in which case Chief Justice Taft emphasizes that the occupation tax there imposed upon the net receipts of foreign insurance companies admitted to do business in Illinois was

"A heavy discrimination in favor of domestic insurance companies of the same class and in the same business."

and likewise distinguishes it from the case of

Terral v. Burke Construction Co., 257 U. S. 529,

unless the Terral case is to be understood, as claimed by counsel, as overruling every decision of this Court upholding state statutes regulating insurance companies, a conclusion which was rejected by the Supreme Court of the State of Minnesota, in

The Glidden Co. et al. v. Retail Hdwe. Mut. Fire Ins. Co., 233 N. W. 310,

and which is likewise disproved by the later decisions of this Court in

Nat'l. Ins. Co. v. Wanberg, 260 U. S. 71;

Merchants Mut. Auto. Liability Ins. Co. v. Smart, 267 U. S. 124,

and by the distinction pointed out in

Tyson & Bro. v. Banton, 273 U. S. 418.

In all of the last three cases the doctrine of state control over insurance companies is repeated and extended and distinctly differentiated from the control over other corporations.

The cases cited by counsel overruling the Kansas Industrial Arbitration statute are clearly distinguished from the case at bar for, unlike the business of insurance, the business there involved was held not affected by public interest.

II.

The Policy Here in Question Was a Voluntary Contract.

Counsel points out that the Supreme Court of Minnesota in the Itasca Paper Company case held that the policy, though in the form prescribed by statute, was a voluntary contract. Counsel then suggests that, inasmuch as the decision in the pending case makes no allusion to the theory of voluntary contract, the Minnesota Court had abandoned that position. We submit that this is not warranted by the decision in the pending case, for the Court there states that the Appellant asked a reconsideration of the questions involved upon the ground that later Federal cases had changed the doctrine of the Itasca Paper Company case, and the Court, after going over the matter, concludes

> "After a thorough reconsideration, we follow the Itasca case, and extended further discussion is not necessary."

We fail to find in this any departure from the doctrine of the Itasca Paper Company case. On the contrary, it is reaffirmed without being repeated verbatim.

The Minnesota Supreme Court, long prior to the Itasca Paper Company case, held such a policy, though in the prescribed statutory form, a voluntary contract.

Kollitz v. Equitable Ins. Co., 92 Minn. 234.

The higher Courts of other states have held the same.

Flatley v. Phoenix Ins. Co., 95 Wis. 618;

Dunter v. Westchester Fire Ins. Co., 104 Me. 372;

Ebner v. Ohio State Life Ins. Co., 69 Ind. App. 32.

The Circuit Court of Appeals of the 8th Circuit, in the case of Continental Ins. Co. of N. Y. v. Titcomb, 7 Fed. 2nd Series, 833,

made a similar ruling.

The Circuit Court of Appeals of the 9th Circuit, in the case of Chun Ngit Mgan v. Prudential Ins. Co. of America, 9 Fed. Rep. 2nd Series, 340,

made a similar holding under the Hawaii statute.

The Circuit Court of Appeals of the 8th Circuit, in the recent case of

Orient Ins. Co. v. Skellet, 28 Fed. Rep. 2nd Series, 968

again held that

"although the statute prescribed the terms of the policy, it was contractual when issued, bound the parties as to the mode of procedure in ascertainiing the loss, but did not oust the courts of jurisdiction on the question of liability of the insurer."

In this connection it should be noted that in the Wanberg case cited above, 260 U. S. 71, Chief Justice Taft pointed out that the statute

"does not force a contract on the company. It need not accept an application at all, or it can make its arrangements to reject one within twenty-four hours."

And again, in the Smart case, 267 U. S. 124, Chief Justice Taft again remarks:

"It is to be remembered that the assumption of liability by the insurance company under Section 109 is entirely voluntary. It need not engage in such insurance if it chooses not to do so."

And again in the Riggs case above set forth, 203 U. S. 241, Justice Harlan remarks:

"If a life insurance corporation does not approve such a restriction upon the conduct of its affairs, it is privileged to cease doing business."

While these statements of the Court are to be taken in connection with the statutory provisions there involved limiting the rights of the insurance companies, they do suggest that, when an insurance company, domestic or foreign, accepts the provision of a statute, provided there is no discrimination between the two, and issues its policy pursuant thereto, it cannot be heard to say that the contract was involuntary, at least so long as the statutory regulation is not a discriminatory one.

While in the cases last-cited this Court has indicated that it was optional with the companies either to accept the provision of the statute or refrain from doing business, the Appellee does not rest its claim that the contract here involved was voluntary solely upon that basis. The statute which Appellant complains of, has been on the statute books of Minnesota since 1913 in its present form. Fire insurance companies doing business in the State of Minnesota have been writing contracts in the form prescribed by the statute since that time. They have tendered their contracts to the insured with the statutory arbitration provision incorporated therein. They have collected premiums from the insured upon this form of contract, and the insured necessarily has relied upon the fact that, in case of loss, his claim would be speedily and easily adjusted by a board of arbitration, and that he would not have his loss determined at the unskilled hands of a jury. Until the Abramovitz case, supra, decided in 1927, no fire insurance company had ever sought to test out the validity of the statute, or attempted to repudiate the provision thereof requiring that the loss be determined by a board of arbitration. Millions of dollars have been collected by the insurance companies since the enactment of this statute

from the insured, upon contracts which the insurance companies tendered, which contained the arbitration clause which the companies now claim deprives them of their constitutional rights, by being arbitrary and unreasonable.

Counsel apparently in his brief, wherein he recites numerous authorities and advances numerous arguments to the effect that this is an involuntary contract, completely overlooks the fact that, if the insurance companies did not desire to write a policy in the standard form, and if the law providing for a board of arbitration was unconstitutional and void, as they now claim it to be, it was not necessary for them to observe it. They could have tendered policies to the insured without this provision being contained therein, and could have continued doing business with such a policy until such time as the state attempted to punish the companies by revoking their license. They could have tested the constitutionality of this statute in Court many years ago, instead of waiting until a substantial loss occurred, and then try to evade the payment thereof, as fixed by the Board of Arbitration by claiming the provision of the statute requiring a Board of Arbitration to determine the loss to be void.

In the case of

Itasca Paper Co. v. Niagara Fire Ins. Co., 220 N. W. 425, the Supreme Court of Minnesota, in commenting upon this question, said:

> "It is argued that this construction forbids the company raising the question of the constitutionality of the law and that it must submit or go out of business in the state. But such is not the case. No one can be compelled to observe an unconstitutional law. There are ways to raise such questions. Citing Ludwig v. Western Union Tel. Co., 216 U. S. 146, 39 S. Ct. 280, 54 L. Ed. 423; 32 C. J. 243."

The Appellees in this case well might claim that the insurance companies have waived the right to now question the constitutionality of the provision of the statute here involved, or they might claim that the company, through acquiescence in the law, and by contracting with the insured on the basis of a standard form of policy, is now estopped from questioning the validity of the law in this case. But it makes little difference whether the Appellees in this case rest upon the theory of waiver or estoppel or voluntary contract; the result remains the same.

It cannot be that the insurance company, from the year 1913 until the present time can have carried on the business of fire insurance in this State, tendered the standard form of policy to the insured, and the minute that the board of arbitration, provided for in the statute and the policy, returns an award or fixes a loss at a greater sum than it deems satisfactory to it, can promptly repudiate that portion of the policy and say to the insured that "You must resort to a jury to determine your loss."

Respectfully submitted,

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CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 4.—October Term, 1931.

The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, Appellant,

vs.

The Glidden Company, Marshall-Wells Company, Bank of Commerce and Savings, Inc., of Duluth, Minnesota, etc., et al.

Appeal from the Supreme Court of the State of Minnesota.

[November 23, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

This case is here on appeal, § 237a of the Judicial Code, from a judgment of the Supreme Court of Minnesota, upholding the constitutionality of the arbitration provisions of the standard fire insurance policy prescribed by Minnesota statutes. 181 Minn. 518.

Appellant, a Wisconsin corporation licensed to carry on the business of writing fire insurance in Minnesota, issued, within the state, its policy insuring appellees' assignor against loss, by fire, of personal property located there. The policy was in standard form, the use of which is enjoined by statutes of Minnesota on all fire insurance companies licensed to do business in the state. Mason's Minn. Stat. 1927, §§ 3814, 3366, 3512, 3515, 3711. Failure to comply with the command of the statute is ground for revocation of the license to do business, § 3550, and wilfull violation of it by any company or agent is made a criminal offense, punishable by fine or imprisonment. §§ 3515, 9923.

A fire loss having occurred, the insured appointed an arbitrator and demanded of petitioner that the amount be determined by arbitration as provided by the policy.[1] The appellant having refused to participate in the arbitration, the insured, in accord-

[1] Mason's Minn. Stat. 1927, § 3512. " . . . In case of loss, except in case of total loss on buildings, under this policy and a failure of the parties to agree as to the amount of the loss, it is mutually agreed that the amount of such loss shall, as above provided, be ascertained by two competent, dis-

ance with the arbitration clause, procured the appointment of an umpire to act with the arbitrator designated by the insured. The arbitrator and umpire thus selected proceeded to determine the amount of the loss and made their award accordingly.

In the present suit, brought to recover the amount of the award, the appellant set up by way of defense, the single point relied on here, that so much of the statutes of Minnesota as require the use by petitioner of the arbitration provisions of the standard policy infringes the due process and equal protection clauses of the Fourteenth Amendment. In rejecting this contention and in sustaining a recovery of the amount of the award, the Supreme Court of Minnesota, consistently with its earlier decisions, ruled that the authority of the arbitrators did not extend to a determination of the liability under the policy, which was a judicial question, reserved to the courts, but that their decision as to the amount of the loss is conclusive upon the parties unless grossly excessive or inadequate, or procured by fraud. See *Glidden Co.* v. *Retail Hardware Mut. Fire Ins. Co.*, 181 Minn. 518, 521, 522; *Abramowitz* v. *Continental Ins. Co.*, 170 Minn. 215; *Harrington* v. *Agricultural Ins. Co.*, 179 Minn. 510.

This type of arbitration clause has long been commonly used in fire insurance policies, both in Minnesota and elsewhere, and, when

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interested and impartial appraisers who shall be residents of this state, the insured and this company each selecting one within fifteen days after a statement of such loss has been rendered to the company, as herein provided, and in case either party fail to select an appraiser within such time, the other appraiser and the umpire selected, as herein provided may act as a board of appraisers, and whatever award they shall find shall be as binding as though the two appraisers had been chosen; and the two so chosen shall first select a competent, disinterested and impartial umpire; provided, that if after five days the two appraisers cannot agree on such an umpire, the presiding judge of the district court of the county wherein the loss occurs may appoint such an umpire upon application of either party in writing by giving five days' notice thereof in writing to the other party. Unless within fifteen days after a statement of such loss has been rendered to the company, either party, the assured or the company, shall have notified the other in writing that such party demands an appraisal, such right to an appraisal shall be waived; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of the loss; . . ."

voluntarily placed in the insurance contract, compliance with its provisions has been held to be a condition precedent to an action on the policy. *Gasser* v. *Sun Fire Office*, 42 Minn. 315; *Hamilton* v. *Liverpool, London & Globe Ins. Co.*, 136 U. S. 242; *Scott* v. *Avery*, 5 House of Lords 811, 854; see *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 121.

Appellees insist that the use of the clause here was voluntary, since the appellant was not compelled to write the policy, and that in any case appellant, by long acquiescence to the statute, is estopped to challenge, after the loss, the right of the insured to rely upon it. Without stopping to examine these contentions, we assume that appellant's freedom of contract was restricted by operation of the statute, and pass directly to the question decided by the state court, whether the Fourteenth Amendment precludes the exercise of such compulsion by the legislative power.

The right to make contracts embraced in the concept of liberty guaranteed by the Fourteenth Amendment is not unlimited. Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 567. Hence, legislation otherwise within the scope of acknowledged state power, not unreasonably or arbitrarily exercised, cannot be condemned because it curtails the power of the individual to contract. *McLean* v. *Arkansas*, 211 U. S. 539; *Schmidinger* v. *Chicago*, 226 U. S. 578; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389; *Erie R. R.* v. *Williams*, 233 U. S. 685; *Keokee Cons. Coke Co.* v. *Taylor*, 234 U. S. 224.

The present statute substitutes a determination by arbitration for trial in court of the single issue of the amount of loss suffered under a fire insurance policy. As appellant's objection to it is directed specifically to the power of the state to substitute the one remedy for the other, rather than to the constitutionality of the particular procedure prescribed or followed before the arbitrators, it suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. See *Missouri ex rel. Hurwitz*

v. *North*, 271 U. S. 40. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard.

The records and briefs present no facts disclosing the reasons for the enactment of the present legislation or the effects of its operation, but as it deals with a subject within the scope of the legislative power, the presumption of constitutionality is to be indulged. *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251; see *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584; *Ohio ex rel. Clarke* v. *Deckebach*, 274 U. S. 392, 397. We cannot assume that the Minnesota legislature did not have knowledge of conditions supporting its judgment that the legislation was in the public interest, and it is enough that, when the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded.

Without the aid of the presumption, we know that the arbitration clause has long been voluntarily inserted by insurers in fire policies, and we share in the common knowledge that the amount of loss is a fruitful and often the only subject of controversy between insured and insurer; that speedy determination of the policy liability such as may be secured by arbitration of this issue is a matter of wide concern, see *Fidelity Mut. Life Ass'n.* v. *Mettler*, 185 U. S. 308; *Farmers' & Merchants' Ins. Co.* v. *Dobney*, 189 U. S. 301; that in the appraisal of the loss by arbitration, expert knowledge and prompt inspection of the damaged property may be availed of to an extent not ordinarily possible in the course of the more deliberate processes of a judicial proceeding. These considerations are sufficient to support the exercise of the legislative judgment in requiring a more summary method of determining the amount of the loss than that afforded by traditional forms. Hence the requirement that disputes of this type arising under this special class of insurance contracts be submitted to arbitrators, cannot be deemed to be a denial of either due process or equal protection of the laws.

Granted, as we now hold, that the state, in the present circumstances, has power to prescribe a summary method of ascertaining the amount of loss, the requirements of the Fourteenth Amendment, so far as now invoked, are satisfied if the substitute remedy is substantial and efficient, see *Crane* v. *Hahlo*, 258 U. S. 142, 147. We cannot say that the determination by arbitrators, chosen as provided by the present statute, of the single issue of the amount of loss under a fire insurance policy, reserving all other issues for trial in court, does not afford such a remedy, or that in this respect it falls short of due process, more than the provisions of state workmen's compensation laws for establishing the amount of compensation by a commission, *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 207-208; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 235; or the appraisal by a commissioner of the value of property taken or destroyed by the public, made controlling by condemnation statutes, *Dohany* v. *Rogers*, 281 U. S. 362, 369; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 695; *Crane* v. *Hahlo, supra*, p. 147; or findings of fact by boards or commissions which, by various statutes, are made conclusive upon the courts if supported by evidence, *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *I. C. C.* v. *Union Pacific R. R. Co.*, 222 U. S. 541; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663; *Silberschein* v. *United States*, 266 U. S. 221; *Ma-King Products Co.* v. *Blair*, 271 U. S. 479.

Affirmed.

A true copy,

Test:

Clerk, Supreme Court, U. S.